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HEARING ON THE NOMINATIONS OF KENNETH KOPOCIS TO BE ASSISTANT ADMINISTRATOR FOR THE OFFICE OF WATER OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), JAMES JONES TO BE ASSISTANT ADMINISTRATOR FOR THE OFFICE OF CHEMICAL SAFETY AND POLLUTION PREVENTION OF THE EPA, AND AVI GARBOW TO BE GENERAL COUNSEL FOR THE EPA

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

JULY 23, 2013

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED THIRTEENTH CONGRESS
FIRST SESSION

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C O N T E N T S

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TUESDAY, JULY 23, 2013

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:58 a.m. in room 406, Dirksen Senate Office Building, Hon. Barbara Boxer (chairman of the committee) presiding.

Present: Senators Boxer, Vitter, Cardin, Whitehouse, Udall, Inhofe, Barrasso, Crapo, Boozman, and Fischer.

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. The committee will come to order. The Senate Committee on Environment and Public Works will consider the nomination of Ken Kopocis to be Assistant Administrator for the Office of Water at the EPA, and Jim Jones to be Assistant Administrator for the Office of Chemical Safety and Pollution Prevention, and Avi Garbow to be General Counsel of the EPA.

The confirmation of qualified individuals to lead agencies is one of the Senate's most important responsibilities, and I am happy to say that last week we voted to confirm Gina McCarthy as the Administrator of the EPA and, as Administrator, she is responsible for ensuring the EPA fulfill its critical mission of protecting public health and the environment.

While Gina heads the Agency, she does rely on her assistant administrators and general counsel to help make the day-to-day decisions that keep the Agency on track. Each of the nominees here today brings essential experience and expertise that will help the Administrator implement programs that reduce pollution in the air we breathe, remove contamination from the water we drink, and clean up toxic wastes threatening communities.

Ken Kopocis is well known to this committee. From 2006 to 2008, he served on the EPW Committee Majority Staff as Deputy Staff Director for Infrastructure; helped us get through some very important legislation. Very difficult, but he was so good at this. He worked on a number of water issues, he played that key role in WRDA of 2007, and he has held multiple positions on the House Transportation and Infrastructure Committee. Ken's work on water issues in the Congress spans over 25 years.

Jim Jones brings more than two decades of experience working for the EPA. He is currently the Acting Assistant Administrator for EPA's Office of Chem Safety and Pollution Prevention. From 2007 to 2011, Mr. Jones was Deputy Assistant Administrator for this office, and from 2003 to 2007 he served as Director of the Office of Pesticide Programs at the EPA. Before that, he held several management positions at EPA and was Special Assistant to the Assistant Administrator for toxics.

His depth of experience on chem regulation policies will help us move forward on these critical issues.

Avi Garbow has worked in the legal field for more than 25 years. He was an attorney-advisor at EPA from 1992 to 1997; he worked for the U.S. Justice Department from 1997 to 2002, where he served in both the Environmental Crimes Section and the Wildlife and Marine Resources Section. After gaining additional legal experience in the private sector, he came back to the EPA in 2009, where he has worked as Deputy General Counsel for the Agency.

His legal expertise will be valuable to us and to the Administrator.

So this hearing is an important step in the Senate's open and transparent process of considering and confirming people who will work every day to make our lives better. I believe this committee and the full Senate should act quickly on these nominees and provide Administrator McCarthy with the qualified people she needs in order to do her job, and I look forward to the nominees' testimony.

With that, I would turn to Senator Inhofe.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Thank you, Madam Chairman, and welcome all three gentlemen here today.

First, I am concerned that the EPA has a bias in its interpretation of Federal court cases. In a recent case involving Summit Petroleum, the EPA required the company to combine or aggregate the emissions of multiple oil and gas wells spread out over 42 square miles in Michigan and consider them as though they were one source. This triggered an expensive permitting requirement that would have given the EPA a foothold of additional regulation over this entity. Litigation ensued; Summit Petroleum won in the 6th Circuit Court of Appeals late last year. The court said the EPA could not combine sources unless they are truly right next to one another, adjacent.

On December 21st, 2012, the EPA issued a memo explaining how the Agency would apply this decision moving forward and, instead of applying it nationwide, the Agency said it would be limited to

just those within the 6th Circuit. This is problematic to me because it underscores the adversarial nature of the Agency toward oil and gas industry.

But it was easy for EPA to apply this decision, even if only in the 6th Circuit. All EPA did was essentially revive a 2007 memo on the same topic. This memo is important because it was first appealed by Administrator McCarthy when she was head of the Air Office in September 2009. While the previous administration had interpreted the law correctly, Administrator McCarthy made a policy decision that was intended to require more EPA permitting of oil and gas wells in inappropriately combining the emissions of multiple sources into one.

The EPA lost in court, after reversing in appropriate policy in 2009, but EPA is not applying this decision nationwide simply because it doesn't like it. The EPA has done the opposite in cases where it does like the outcome of the court, quickly applying a circuit or a district court's decision nationwide.

I had asked my staff to come up with an example of how this is different, the case that they are using currently. In a Colorado District case involving Louisiana Pacific, the court adopted a highly constrained view of what it takes to establish federally enforceable emission limitations. Had the court respected a more broad view of these limitations, it would have lowered the total emissions of certain facilities and eliminated their need to receive major source permits from the EPA. But because the EPA wanted to increase the number of sources requiring permitting, it issued a new guidance document applying the district court's decision nationwide, just the opposite of what we have today, soon after the decision was made, at great cost to the affected entities.

I am also concerned about the Agency's use of highly unreliable and objectionable methods to calculate the benefits of rules it is putting together. Most notably, the Water Office's 316(b) cooling water rule relies on a stated preference survey to justify its high cost. This survey asks respondents to name a price they are willing to pay to keep fish from being killed. These surveys are notorious for not being well constructed, and in this case it does not provide respondents with a true picture of the tradeoffs being made. But the EPA is in the process of using this rule to inflate the benefits of a rule so that it can justify one that is more costly to the power generation and manufacturing sectors in the economy.

Finally, the EPA's pursuit of guidance over waters of the U.S. continues to be a major concern of mine. Congress flatly rejected the proposals of expanding the Agency beyond the navigation waters when the Clean Water Restoration Act was considered in the 111th Congress. And, of course, you remember that, Ken, because you were there, actually working with Congressman Oberstar. At that time I think he was the ranking member. Anyway, that was taking place at that time. And not only did we beat that, but we also, the two authors, Oberstar and Feingold in the Senate, were both defeated in the next election. So I can see that there was a lot of enthusiasm for stopping that.

So that is right, you are about to hit that. Go ahead and do it.

I am looking forward to this hearing.

Senator BOXER. As am I.

Senator INHOFE. As am I. And I know all three of the witnesses, so that is kind of unusual, isn't it?

Senator BOXER. That is good. That is excellent.

OK, so the order of arrival: Senator Crapo, Barrasso, Fischer. Is that right? OK.

OPENING STATEMENT OF HON. MIKE CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. Thank you, Madam Chairman. I appreciate this hearing today, as well. I want to thank the nominees for being here with us to discuss your nominations, and I appreciate your willingness to serve.

There is no doubt that this Agency faces considerable challenges, and as you are going to hear from a lot of us today, there are issues that we have. I think that the positions which the three of you have been nominated to are important not only to Idaho, but to the Nation. As the members of this committee are well aware, if you are confirmed, you will be directly involved in setting policies that have far-reaching effects for all Americans.

I just want to make a couple observations and talk about a couple of specifics that maybe we can get into further in the questions.

But I have to say that, in Idaho, probably the agency that is most brought up to me by those who visit me, whether it is individual citizens, farmers, ranchers, county commissioners, mayors, or what have you, is the EPA, and the reason is because of the EPA's reach into every aspect of the life of individuals, businesses, and communities, particularly small communities that don't have the economies of scale to deal with a lot of the issues that are being brought to them. There is no agency that has, I think, a greater reach, unless maybe it is the IRS.

Actually, sometimes I joke only to think that perhaps maybe the EPA and the IRS are competing to be the one most feared by the people through their enforcement activities. And I am sorry to say that, but I have to say that just in terms of the input to my office from people from across the spectrum, there is probably not an agency that is more frequently brought up than the EPA because of its far reach, and many of us believe that it is not necessary; that there is an enforcement mentality that is extreme, and that rather than trying to work to find solutions, instead we have an approach at the EPA to force compliance and to utilize very heavy-handed techniques in order to do so.

Now, if that is not fair or correct, I would love to understand that. But I can tell you that it is not what my constituents understand today. And let me just give a couple of examples.

Probably everybody is familiar with the Sackett case, where a family, and if you have seen the photographs, I don't think anybody could reasonably believe that they were acting in anything but good faith, tried to build their dream home near a lake in Idaho, and after they started it was determined by the EPA that this was a wetland, even though it wasn't on any wetlands designations or anything like that.

The bottom line is that in order to deal with this issue, what happened was the EPA threatened this family with fines up to $75,000 a day. They accumulated up to the millions of dollars, I

think. I don't know what the final total was before they finally got to go to court. And the EPA wouldn't even let them challenge the compliance order that was issued in court; claimed that they had no legal avenue to do anything but to comply. And if they didn't comply, they had to face these unbelievable fines that no individual, in fact, probably not many businesses in Idaho could have lived with.

Ultimately the case went to court. The court said that the EPA was wrong and, in fact, that the Sacketts did have a right to challenge the compliance order, and now that case is, I think, still in litigation as they make that challenge.

But it is the aggressive act of basically demanding compliance, threatening phenomenal fines and penalties, and being rigid about allowing the Agency's actions to even be reviewed.

One other example and then I will quit; I know I am running out of time here.

And that is the Clean Water Act. Mr. Kopocis, I know you are involved with this, but we have been fighting over whether navigable waters truly mean waters that are navigable or whether it includes ditches and ponds and any other water that accumulates; and courts have now ruled that navigable does have meaning and there were efforts to overturn that here in committee and in this Congress which were rebuffed. The word navigable is still in the statute and yet it is my understanding that there is a guidance, and perhaps rules to follow, that essentially undercuts that and does what Congress would not do; and that is an issue that I hope we can get into in the questions and answers.

I see my time is now down to 5 seconds, so I better wrap it up, but, again, thank you, Madam Chairman, for holding this hearing.

Senator BOXER. Thank you so much.

I wanted to say, you know, your people are afraid of the EPA. That is what you said, they fear the EPA.

Senator CRAPO. Yes.

Senator BOXER. I want you to know in the polls our favorable approval in the Senate is 9 percent, and the EPA is 70 percent favorable. But maybe the 30 percent all live in your State.

Senator CRAPO. They probably do.

Senator BOXER. In my State, people happen to really appreciate clean air and clean water more than I could tell you in California, because we have gone through such a bad period of horrible smog. So it is just so interesting. What I love about the Senate is the different perspectives we each bring from our States.

Senator CRAPO. Well, Madam Chairman, let me just say that the mandate of the EPA under the statute to protect our water and our air and our environment is one that is deeply appreciated by the people of Idaho. It is the way that it is being done and the heavy-handed manner that is causing these troubles.

Senator BOXER. Fair enough.

Let's move to Senator Whitehouse.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you, Chairman. I am glad to see these nominees moving forward. We have some important issues to

work through with Congress and the EPA in the President's second term, and I think these are some very, very well qualified public servants who will help EPA fulfill its mission to protect human health and the environment.

We have recently come to a bipartisan agreement confirming Administrator McCarthy, and I hope we can continue the bipartisan spirit. Some of these nominees have been around for a while. Mr. Kopocis was nominated for his position more than 2 years ago, so it is about time we got going on this, and I hope our bipartisan streak can continue.

Mr. Kopocis is nominated to oversee the Office of Water, which was responsible for keeping our water safe for drinking and swimming and fishing. That office protects and restores aquatic and marine habitats like wetlands that support fisheries and recreation, and provides protection from flooding and storms. They have a very important piece of work before them that Rhode Island cares very much about, which is the rule to address stormwater discharge. Obviously, an issue like that requires a lot of balancing of interests of various stakeholders, and Mr. Kopocis has plenty of experience doing exactly that, balancing of interests and working together with stakeholders.

In Rhode Island, our dominant physical feature and a feature that is enormously important to our economy is our Narragansett Bay. Well, 60 percent of Narragansett Bay's watershed is out of state, it is in Massachusetts; and if they are not taking care of their stormwater runoff in Massachusetts, we pay the price in Rhode Island. And it is very important that EPA be active in this area. We can have a heavy rainfall dump as much as 90,000 pounds of nitrogen into Narragansett Bay. So look forward to working with Mr. Kopocis and with our friends from Massachusetts on that.

Obviously, the jurisdictional issue that Senator Crapo raised is an important one, and I think we need to resolve that so that there is not uncertainty for people who are out there wondering whether regulations apply.

Mr. Jones has served the American public and five presidents in 26 years at the EPA, and he has had a very impressive career. Now EPA needs to help us work to overhaul the Toxic Substances Control Act, and I don't think there could be a better candidate from EPA than Mr. Jones to help this committee move forward.

Senator Vitter, our ranking member, has been working in a bipartisan fashion with Senator Lautenberg to introduce the Chemical Safety Improvement Act. With the loss of Senator Lautenberg, we need to find a way to continue forward to find a way to overhaul the TSCA statute.

I want to just take a moment and say that our friend, Senator Lautenberg, was a lifelong champion on this issue and had a 95 percent lifetime score from the League of Conservation Voters, but of all the conservation and environmental issues he championed, none was dearer to him than the chemical safety issue. So, in his name and memory, we want to work forward to solve that problem and, Mr. Jones, I am sure you can be very helpful in that.

The Office of General Counsel is obviously vital. I have been executive department counsels before, myself, and I know how wide-

ranging the experience and energy that is required in such a position. Mr. Garbow has more than two decades of legal experience, including serving as the deputy to the position that he has now been nominated for for the past 4 years. He has been a partner in private practice; he has been a trial attorney at DOJ.

Madam Chairman, these are people whose experience and whose expertise will be an asset for the EPA and for the American people, and I welcome them. I look forward to advancing their nominations, and I hope they can be moved forward quickly in the new spirit that we have developed regarding executive nominees.

Senator BOXER. Thank you so much, Senator.

If it is OK with everyone, since Senator Vitter just came, is it all right if we call on him next?

OPENING STATEMENT OF HON. DAVID VITTER, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator VITTER. Thank you, Madam Chairman. I apologize and U.S. Airways apologizes for my being a little late, but it is great to be with all of you and the nominees. These are certainly three very pivotal positions with regard to EPA and regulatory policy.

I would like to particularly focus this morning on the President's nomination of Ken Kopocis as Assistant Administrator for EPA's Office of Water. As a senior policy advisor for the Office of Water, Mr. Kopocis is already part of a team that is currently engaged in what we all think is a troubling expansion of regulatory authority under Section 404 of the Clean Water Act. Any individual or business requiring a permit to dredge or fill wetlands under Section 404 must now worry, because of recent events, that EPA might preemptively veto a project even before a permit application is even submitted, or that the Agency may suddenly revoke a Section 404 permit years after it has been issued.

This is exactly the type of uncertainty that has been threatening and putting a halt on a broad spectrum of economic activity, particularly recently, including housing, development, job creating, mining projects, and essential flood control.

It also appears that the Office of Water is attempting to dictate when a business should submit a Section 404 permit application, a decision that should be left entirely to the entity seeking the permit.

I look forward to hearing Mr. Kopocis' perspective on EPA's unprecedented reading of Section 404 in this regard, as well as other issues.

Mr. Jim Jones has worked at EPA for more than two decades and has served as both Deputy Assistant Administrator, as well as Acting Assistant Administrator for the Office of Chemical Safety and Pollution Prevention at EPA. Again, this is a very important position and I echo Senator Whitehouse's comments and look forward to his playing, hopefully, a constructive role as we try to bring forward a bipartisan TSCA reform.

And Mr. Avi Garbow has been nominated to replace Scott Fulton as General Counsel of EPA. Mr. Fulton departed the agency 4 days after Congress first questioned EPA on the former administrator's use of the Richard Windsor alias email address. His resignation also came on the heels of the resignation of Region 6 Administrator

Al Armendariz and was subsequently followed by the resignation of Region 8 Administrator James Martin. Mr. Martin resigned shortly after this committee uncovered he had been using his personal email address to conduct agency business, in violation of EPA policy.

These issues represent only a fraction of the problems at EPA that the committee has uncovered. I mention these today because these disappointments emanate from the same core: an EPA that does not place sufficient focus on transparency and accountability. As a result, the EPA inspector general is investigating these and other instances of wrongdoing.

Through the course of negotiations surrounding Gina McCarthy's confirmation, EPA leadership has agreed to issue new guidance for implementing the IG's recommendations.

If confirmed as general counsel, Mr. Garbow will play an instrumental role in restructuring EPA policy to improve the Agency's compliance with fundamental transparency statutes such as the Freedom of Information Act, the Privacy Act, and the Federal Records Act. Moreover, he will be the final arbiter of whether EPA intends to commit to any level of transparency nearing what is so often espoused by the President. It is my real hope that he will take to heart improving EPA's record on transparency, that it is a nonpartisan and shared and important goal. Ideally, we will be able to reach across the aisle and work together with the Agency to help better comply with the law, and I think our agreements reached during the McCarthy nomination process is a very substantial and very important part of that.

And I look forward to hearing from all of these nominees.

Thank you, Madam Chair.

Senator BOXER. Senator Cardin.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Thank you, Madam Chair.

Let me just concur with your initial observation about the importance and public support for the mission of the Environmental Protection Agency. People want to make sure that, when they turn on their tap at home, the water that they get is safe for them to drink, and they rely upon the Environmental Protection Agency and our Federal framework of laws for that to be true. They expect that when their children are swimming in a lake, that it is safe for them to be in that lake swimming. They expect that when they breathe the air, that the air will be safe and that their children, who perhaps have respiratory issues, will be able to go out and parents won't have to stay home from work, lose a day of pay, because of air quality being such dangerous for them to be out and breathing. And they expect that our toxics and our chemicals are handled in a safe manner in order to protect the welfare of our community.

That is what they expect and, quite frankly, the Government has done a reasonable job in making that a reality. And I think some of the proudest moments in the history of America is that the Democrats and Republicans, working together to pass the Clean Water Act, to pass the Clean Air Act, to work together to set up

sensible scientific-based laws to protect the safety of the people in our community.

Ken Kopocis was there as we created those laws. I first got to know him in 1987, when I was elected to the House of Representatives, and worked with him back on those days on the House side. I worked with him on the Senate side. He has spent his entire career in public service in order to advance public laws that make sense and public policy that makes sense.

Now, it is very interesting. Two years ago, Madam Chair, when you had this hearing, when we were talking about Ken Kopocis, I was proud to hear my Democratic and Republican colleagues praise him for his commitment to public service but, just as importantly, his ability to work with people of different views in order to try to bring about harmony and policy. That was our view 2 years ago, and I was quite surprised that we never were able to confirm Ken Kopocis for this position.

I look at the other nominees that are here, Jim Jones, who has a very distinguished career in serving the Environmental Protection Agency, critically important position in dealing with chemicals. We need a confirmed position. I look at Avi Garbow, who I was privileged to recommend to the President for this appointment because of his distinguished career. An outstanding attorney who understands the responsibilities in that Agency.

We have three nominees whose qualifications are beyond question. And now, Madam Chair, I want to just comment on what Senator Whitehouse said, I hope this new spirit of cooperation, we may differ on the final vote. I hope we don't differ on the final vote. I hope all three are confirmed by the margins that they deserve. But it is our responsibility to make sure that the Senate takes up these positions for up or down votes. The EPA is an important agency. Some in this committee may disagree with the law. OK, try to change it. That is the democratic process. Let's use regular order to deal with those policy judgments. But the President and the American people are entitled to have the positions that are provided by law filled and confirmed, and we are certainly entitled to have up or down votes on these nominations.

So, Madam Chair, I hope we will have a constructive hearing where we can talk about the qualifications of these individuals and their commitment to carrying out the law; not their views, the law that has been passed by Congress, which the American people support us enforcing those laws. But allow us to have up or down votes. Stop the delay. Two years for this position to be filled is outrageous. It is time for Congress to carry out our responsibility. My colleagues talk about the responsibilities of the people before us. How about our responsibility to vote and allow the Senate to have an up or down vote on these three nominees?

Senator BOXER. Thank you, Senator Cardin.

Senator Barrasso, followed by Senator Fischer.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM THE STATE OF WYOMING

Senator BARRASSO. Thank you, Madam Chairman. Thanks for holding the hearing. I would like to welcome all the nominees. I would also like to focus on one of the specific positions, and that

is the nomination of Ken Kopocis to be the head of the EPA's Office of Water.

If confirmed, he would be in charge of implementing the Clean Water Act, the Safe Drinking Water Act, and other statutes. In the previous Congress, I expressed concerns with regard to this nomination. I am still concerned with the depth of this nominee's past involvement to change the scope of the Clean Water Act beyond congressional intent, and we have heard that from other Republican colleagues today who have made their statements. I believe this nominee has still failed to explain his views on public and stakeholder input on regulations that he would be in charge of and explain his understanding of the role of Congress versus the EPA in terms of who makes the laws in this Nation.

We should not be taking making law through guidance, as is the case with the pending clean water jurisdictional guidance that is currently with the Office of Management and Budget. This is the guidance that essentially expands the scope of Federal authority to cover all wet areas within a State. Agriculture, commercial and residential, real estate development, electrical transmission, transportation, energy development and mining will be affected and thousands of jobs will be lost. By issuing a guidance document, as opposed to going through the regular rulemaking process, EPA and the Corps are bypassing the necessary public outreach required under the Administrative Procedure Act and failing to fully consider the legal, the economic, and the unforeseen consequences of their actions.

EPA and the Corps affirm that this guidance will result in an increase in jurisdictional determinations which will result in an increased need for permits. Additional regulatory costs associated with changes in jurisdiction and increases in permits will erect bureaucratic barriers to economic growth, will negatively impact farms, small businesses, commercial development, road construction, and energy production, just to name a few.

In addition, expanding Federal control over intrastate waters will substantially interfere with the ability of individual landowners to use their property.

The guidance also uses an overly broad interpretation of the Rapanos decision. The effect is virtually all wet areas that connect in any way to navigable waters are jurisdictional. Both the plurality opinion and Kennedy rejected this assertion of Rapanos.

I am not the only Member of Congress to address these concerns and to express these concerns. We had a vote during the Water Resources Development Act, WRDA, to block this guidance. A clear bipartisan majority, 52 Senators, opposed this guidance on that vote. This should send a clear signal to the nominee and the Administration to not pursue this course of action.

Madam Chairman, I look forward to getting more clarification of my concerns, and thank you for holding the hearing.

Senator BOXER. Thanks, Senator.

Senator Udall.

OPENING STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator UDALL. Thank you, Madam Chair. Pleasure to be here with you today.

Let me thank the nominees for their service, and congratulations on your nomination. It must be a particularly exciting atmosphere, I think, at the EPA right now, knowing that Gina McCarthy has been confirmed. As many of you know, she is a very solid, good, hardworking person. I had experience in New Mexico with her problem-solving abilities. She took a situation which was in litigation; you had coal-fired plants, you had the Governor of New Mexico, a lot of contentious parties, and she resolved that. So I think her ability to just focus on good common-sense solutions is very, very important and I am very excited that she is now in the job and going to be working with you.

I think each of your offices are extremely important to the work that is done at EPA and I wish you well with your confirmation. I would like to take a second to highlight the links between your offices and the State of New Mexico.

With regard to Mr. Kopocis and the Office of Water, I will be very interested in hearing your views on water issues. The entire State of New Mexico is in a severe drought, with 86 percent of the drought considered extreme. We are in first place when it comes to suffering from drought. We aren't proud of this designation. The Office of Water is therefore incredibly important to us to ensure that our drinking water is safe and our watersheds are restored safely to protect human health, support economic and recreational activities, and provide healthy habitats for wildlife.

With regard to Mr. Jones and the Office of Chemical Safety and Pollution Prevention, your office's mission is to protect families and the environment from potential risks from pesticides and toxic chemicals. Your position and office is of further interest right now given the ongoing debate about reforming TSCA, the Toxic Substances Control Act of 1976.

And, of course, Mr. Garbow nominated to the General Counsel's Office. This office provides the chief legal advice to the EPA, providing legal support for Agency rules and policies. This will be particularly important as the President and EPA proceed down the path to writing global warming rules and regulations to comply with the President's new strategy.

Madam Chair, I look forward to hearing from the nominees and I hope I will be able to stay through all of them, but there are several other things going on this morning.

But thank you very much for your service and appreciate having you here today.

Thank you. Yield back, Madam Chair.

Senator BOXER. Thank you, Senator.

Senator Fischer.

OPENING STATEMENT OF HON. DEB FISCHER, U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator FISCHER. Thank you, Madam Chairman, and thank you, Ranking Member, for holding this hearing. And I would like to thank all the nominees for your willingness to serve the public.

I am pleased that we have a native Nebraskan here today, Ken Kopocis, before the committee, and I was grateful for the opportunity to meet with you before today's hearing to discuss some of the concerns that we have in our State about water issues, and to talk about the successes and the challenges EPA has had under the Clean Water Act. I appreciated your acknowledgment that for any given problem generally EPA's first inclination to address it is with more regulation, and that is not always very productive.

In Nebraska, particularly in agriculture, we have made tremendous environmental progress because of collaborative efforts. Farmers' and ranchers' application of new technology and conservation practices, for instances, has resulted in incredible improvements to our land, air, water quality. These environmental gains are not the result of a permit or a mandate or a paperwork requirement from a Federal bureaucracy; they are result of cooperation between producers and local extension educators and conservation agents. These are folks who farmers trust to help them implement science-based solutions that improve our efficiency and reduce our environment impact.

Nebraskans need an EPA that understands this and that will look for ways to collaborate, rather than regulate, whenever possible. Nebraskans also need an EPA that realizes people are the most important resource, and the goal of environmental protection should not be pursued at the expense of all others, including housing, jobs, economic development, and individual rights. When it comes to measuring our success, especially under the Clean Water Act, we need an agency that won't factor people out of the equation.

I am particularly concerned about the EPA's proposed guidance to defined waters of the United States, which would broaden the number and kinds of waters subject to regulation. Expanding the Clean Water Act scope imposes costs on States and localities as their own actions, such as transportation improvements, flood control projects, and drainage ditch maintenance, become subject to these new requirements. I am hopeful EPA will formally withdraw its proposed guidance and proceed with a formal rulemaking process that does respect the limits of law.

Another important issue that crosscuts the potential work of all the nominees before us today is stakeholder involvement. Whether it is in the context of providing small businesses a meaningful opportunity to participate in the stormwater discharge rulemaking, bringing together stakeholders to fix the dysfunctional process of Endangered Species Act's consultation for pesticides approvals, or seeking input of property owners and other affected parties when EPA intends to settle a lawsuit, the Agency must do a better job of conducting its work in a transparent and inclusive manner.

Again, I would like to thank you all for being here, and I look forward to the questions. Thank you.

[The prepared statement of Senator Fischer follows:]

STATEMENT OF HON. DEB FISCHER,
U.S. SENATOR FROM THE STATE OF NEBRASKA

Thank you, Chairman Boxer and Ranking Member Vitter, for holding today's nomination hearing. Thank you, nominees, for being here and for your willingness to serve the public.

I am pleased that we have a native Nebraskan, Ken Kopocis, before the committee today. I was grateful for the opportunity to meet with him ahead of today's hearing to discuss some of the concerns we have in our State about water issues and to talk about the successes and challenges EPA has had under the Clean Water Act.

I appreciated Mr. Kopocis's acknowledgment that for any given problem, generally EPA's first inclination to address it is with more regulation, and that is not always very productive. In Nebraska, particularly in agriculture, we have made tremendous environmental progress because of collaborative efforts. Farmers' and ranchers' application of new technology and conservation practices, for instance, has resulted in incredible improvements to our land, air, and water quality.

These environmental gains are not the result of a permit or a mandate or a paperwork requirement from a Federal bureaucracy. They are a result of cooperation between producers and local extension educators and conservation agents. These are folks who farmers trust to help implement science-based solutions that improve our efficiency and reduce our environmental impact. Nebraskans need an EPA that understands this and that will look for ways to collaborate—rather than regulate—wherever possible.

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Another important issue that crosscuts the potential work of all the nominees before us today is stakeholder involvement. Whether it is in the context of providing small businesses a meaningful opportunity to participate in the stormwater discharge rulemaking, bringing together stakeholders to fix the dysfunctional process of Endangered Species Act consultations for pesticide approvals, or seeking input of property owners and other affected parties when EPA intends to settle a lawsuit, the agency must do a better job of conducting its work in a transparent and inclusive manner.

Mr. Kopocis, Mr. Jones, and Mr. Garbow, thank you again for being here today. I look forward to questioning you about how we can work together to address these important objectives.

Senator BOXER. Thank you.

Thank you all for your comments. We will go now to the panel.

Mr. Kopocis, this is déjà vu all over again, I hope with a happy ending this time. This is a rewrite and we are so happy to see you here. Again, I want to thank you for your work in this committee, and I just would pray and hope that just given your goodwill and the way you work with both sides of the aisle, that hopefully this will have a better outcome for you. So please proceed.

STATEMENT OF KENNETH KOPOCIS, NOMINATED TO BE ASSISTANT ADMINISTRATOR FOR THE OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. KOPOCIS. Thank you. Thank you, Chairman Boxer. Good morning to you, Ranking Member Vitter, and other members of the committee.

Before I begin my prepared remarks, I would like to acknowledge who are with me here today. My wife Chris. She has been my wife for 33 years. My daughter Kim, who is the mother of the most delightful 3-year-old little girl you would ever want to meet, or at least I would ever want to meet, and Hayden Payne. My son Jeff and his wife Taylor are not able to be with us today, and they are

the parents of the cutest 6-week-old little girl that you would ever want to meet.

I am honored and humbled to appear before you today. I have many memories of sitting in this very room as either a Senate or a House committee staffer, and that was during my nearly 27 years on Capitol Hill. While I have sat at this table many times in deliberations and discussions, this is a distinct perspective.

The greatest rewards in my career have been in assisting both Senators and Representatives in developing bicameral, bipartisan legislation to address the Nation's critical water resources and water quality needs.

However, despite those accomplishments and their many rewards, it is my greatest privilege to sit before you as the President's nominee for the Assistant Administrator for EPA's Office of Water. If I am confirmed, I hope that I can fulfill both the President's and Administrator McCarthy's confidence in me.

I have spent the majority of my professional life working to address the Nation's most serious water needs. These include successfully working on eight Water Resources Development Acts; the Water Quality Act of 1987, which Senator Cardin mentioned, to strengthen the Nation's commitment to clean water; protecting and restoring the Everglades and the Florida Keys; ending the practice of using our oceans as dumping grounds for sewage sludge and garbage; the oil pollution prevention, preparedness and response activities following the tragic spill of the *Exxon Valdez* in 1989; and developing targeted programs for the Great Lakes, Chesapeake Bay, Long Island Sound, California's Bay-Delta estuary, Lake Pontchartrain and the Gulf of Mexico, the Tijuana River Valley, San Diego's beaches, and the U.S.-Mexico border region.

I am proud to have had a role in protecting the Nation's beaches and restoring our economically vital estuaries, addressing the impacts of invasive or non-indigenous species, and cleaning up hazardous waste and returning our Nation's industrial legacy to productive use through the Nation's Brownfields program.

Now, the Nation has made great strides in protecting public health and enhancing the environment while simultaneously growing the economy, but we have yet, as a Nation, to achieve the objective established by Congress in 1972 of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. If approved by this committee and confirmed by the Senate, it is my intent to work with all toward achieving that objective for this and future generations.

In my work on the Hill, I had the privilege of working on legislation that, while sometimes controversial, always enjoyed bipartisan support. I learned that true success requires ensuring cooperation and collaboration among all interested and necessary parties. I have always attempted to approach issues with an open mind, interacting with members of the public, State and local officials, and interest groups on legislative and program development and implementation issues; and analyzing facts and the law to develop solutions to national and local problems.

Chairman Boxer and Ranking Member Vitter, your recent work on the Water Resources Development Act of 2013 is a tangible demonstration of working together for a common goal.

I learned on Capitol Hill that your allies do not always have the correct answer, and that the advocates on the other side of an issue are not always wrong. It should be possible to achieve one's stated goals and respect the legitimate perspective of others in the debate. I have observed too often that people hear, but do not listen. If approved and confirmed, you can count on me to listen to all perspectives and views in the debate.

I believe that we all share a common goal of clean and healthy waters. We demand the confidence that when we turn the tap anywhere in the United States, that there will be an abundant and safe supply of drinking water. We can restore and protect our precious resources such as the California Bay Delta, Everglades, Chesapeake Bay, Lake Pontchartrain and the Gulf Coast, the Great Lakes, and the Long Island Sound. We can swim at our beaches and eat the fish that we catch. And we can create opportunities for the next generation that exceed those that were present for us.

Thank you, and I welcome any questions that you may have.

[The prepared statement of Mr. Kopocis follows:]

Mr. Ken Kopocis

Personal Statement

Committee on Environment and Public Works

United States Senate

July 23, 2013

Good Morning Chairman Boxer, Ranking Member Vitter, and other members of the Committee.

I am honored and humbled to appear before you today. I have many memories of being in this room as either a Senate or House committee staff member during my nearly 27 years on Capitol Hill. While I have sat at this table scores of times, this is a distinct perspective.

The greatest rewards in my career have been in assisting both Senators and Representatives in developing bicameral, bipartisan legislation to address the Nation's critical water resources and water quality needs.

However, despite those accomplishments and their rewards, it is my greatest privilege to sit before you as the President's nominee as Assistant Administrator for the EPA Office of Water. If I am confirmed, I hope I can fulfill the President's and Administrator McCarthy's confidence in me.

I have spent the majority of my professional life working to address some of the Nation's most critical water resources needs. This includes eight Water Resources Development Acts; the Water Quality Act of 1987, which strengthened the Nation's commitment to clean water; protecting and restoring the Everglades and the Florida Keys; ending the practice of using our oceans as dumping grounds for sludge and garbage; oil pollution prevention, preparedness and response following the *Exxon Valdez* spill in 1989; and developing targeted programs for the Great Lakes, Chesapeake Bay, Long Island Sound, California's Bay-Delta, Lake Pontchartrain and the Gulf of Mexico, the Tijuana River Valley and San Diego's beaches, and the U.S.—Mexico border region.

I am proud to have had a role in protecting the Nation's beaches and restoring our economically vital estuaries; addressing the impacts of invasive, nonindigenous species; cleaning up hazardous waste, and returning the Nation's industrial legacy to productive use through the Brownfields program, all while protecting public health and the environment.

The Nation has made great strides in protecting public health and the environment while growing the economy, but we have yet to achieve the objective established in 1972 of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. If approved by this Committee and confirmed by the Senate, it is my intent to work with all of you toward achieving that objective for this and future generations.

In my work on the Hill, I have had the privilege of working on legislation that, while not always noncontroversial, always enjoyed strong bipartisan support. I learned that true success requires ensuring cooperation and collaboration among all interested and necessary parties. I have always attempted to approach issues with an open mind, interacting with members of the public, State and local officials, and interest groups on legislative and program development and implementation issues; and, analyzing facts and the law to develop solutions to national and local problems.

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I learned on Capitol Hill that your allies do not always have the correct answer, and the advocates on the other side of an issue are not always wrong. It should be possible to achieve one's stated goals, and respect the legitimate perspective of others in the debate. I have observed that too often people hear, but do not listen. If approved and confirmed, you can count on me to listen to all perspectives and views.

I believe that we all share a common goal of clean and healthy waters; that we demand the confidence that when we turn the tap anywhere in the United States, there will be an abundant and safe supply of drinking water; that we can restore and protect our precious resources such as the California-Bay Delta, the Everglades, Chesapeake Bay, Lake Pontchartrain and the Gulf Coast, the Great Lakes, and Long Island Sound; that we can swim at our beaches and eat the fish that we catch; and that we can create opportunities for the next generation that exceed those that were present for us.

Thank you, and I welcome any questions you may have.

Questions for the Record
July 23, 2013 Hearing on the
Nomination of Kenneth Kopocis to be Assistant Administrator
for the Office of Water of the U.S. Environmental Protection Agency
Committee on Environment and Public Works
United State Senate

Senator Boxer

Boxer 1. The Office of Water is responsible for administering two of the nation's most important infrastructure investment programs- the Clean Water and Safe Drinking Water State Revolving Funds (SRFs). Unfortunately, infrastructure in this country continues to decline. The American Society of Civil Engineers rates our wastewater and drinking water infrastructure a "D."

Boxer 1a. Do you commit to work with this Committee to ensure that we are adequately investing in the Nation's wastewater and drinking water infrastructure?

Response: Yes. I agree with you that wastewater and drinking water infrastructure are critical assets that sustain the quality of our surface waters and our drinking water. If confirmed, I look forward to working with the committee to identify ways to best meet our nation's significant drinking water and wastewater infrastructure challenges.

Boxer1b. Even in the tight budget times that we face, will you work to ensure EPA continues to place a priority on investment in the State Revolving Funds?

Response: Yes. I believe the Clean Water and Drinking Water State Revolving Funds are critical sources of support for our communities as they work to protect human health and achieve our nation's clean water goals. If confirmed, I will work closely with the committee and with my colleagues at the EPA to prioritize investments in the Clean Water and Drinking Water State Revolving Funds.

Boxer 2. EPA recently released an integrated planning framework to help cities comply with stormwater and wastewater requirements. The framework ensures cities will reduce harmful pollution and comply with the Clean Water Act but does so in a flexible manner that allows local governments to address the worst problems first and prioritize investments.

Boxer 2a.. Do you believe this is a successful model that EPA can use to work with municipalities to reduce pollution?

Boxer2b. If confirmed, will you work with state and local governments to promote the use of this framework around the country?

Response to Boxer 2a-b: Yes. I believe an integrated planning approach to addressing our nation's stormwater and wastewater challenges is effective in helping to prioritize our investments in water infrastructure and more effectively achieve our clean water goals. I know

the EPA's Office of Water is currently working closely with the EPA's Office of Enforcement and Compliance Assurance, with the EPA's ten Regional offices, with states, and with communities across the country to promote an integrated planning approach. If confirmed, I look forward to working closely with these stakeholders to further advance such an approach.

Boxer 3. It is critical that EPA use the best available science when implementing federal laws, such as the Safe Drinking Water Act, and carrying out policies to protect water quality in lakes and rivers.

Boxer 3a. Could you please describe the importance that you place on ensuring the use of the best available science in making decisions under the Clean Water Act and Safe Drinking Water Act?

Boxer 3b. If you are confirmed, will you ensure that the Agency continues the use of the best available science in making decisions about safe drinking water and clean rivers and lakes?

Response to Boxer 3a-b: I believe that science is and should be the foundation of the EPA's decision making under the Clean Water Act and Safe Drinking Water Act. Both laws place significant emphasis on ensuring that the EPA works to protect America's drinking water and surface water in ways that are based on the best available science. If confirmed, I commit to making science the cornerstone of the EPA's work to provide clean drinking water and to restore and maintain the chemical, physical, and biological integrity of our nation's waters.

Boxer 4. Mr. Kopocis, the majority of your career has been spent here in Congress, including working as a member of the staff of this Committee. You worked on numerous bipartisan initiatives, including the successful passage of the Water Resources Development Act of 2007.

Boxer 4a. If confirmed, what experiences and lessons from your congressional career will you bring to the Office of Water?

Boxer 4b. What is your perspective on how the Office of Water can work best with this Committee and the Congress?

Response to Boxer 4a-b: My career on Capitol Hill was critical in shaping my understanding of clean water issues and in reinforcing our need to work together to address our nation's clean water challenges. Working for the Committee on Environment and Public Works, and elsewhere in the Congress, strengthened my commitment to working on a bipartisan basis to craft compromise and make progress. I believe that the EPA and the Congress can be partners in achieving clean water results, and if confirmed, I commit to building a strong partnership with the committee in achieving the goals of the Clean Water Act, Safe Drinking Water Act, and other laws implemented by the Office of Water.

Boxer 5. Will you follow the Safe Drinking Water Act in establishing a drinking water standard for perchlorate?

Response: Yes. If confirmed, I commit to learning more about the status of the agency's work to develop a drinking water standard for perchlorate, including the advice recently provided to the agency by the Science Advisory Board, and will work with Administrator McCarthy to ensure that the agency develops an appropriate and protective drinking water standard for perchlorate.

Senator Vitter

Topic: "Waters of the United States" Guidance Document

Vitter 1. During this past week's nomination hearing, I thought your answer to my question regarding the statutory authority for the Clean Water Act (CWA) draft Guidance was unclear.

Explain the Environmental Protection Agency's (EPA) statutory authority to conduct "Guidance" on what constitutes "waters of the United States"?

Response: In the Clean Water Act, the Congress did not define the term "waters of the United States," leaving the term to the EPA to define. The EPA is the final authority on determining the scope of Clean Water Act jurisdiction, and the EPA has in the past taken steps to define the term "waters of the United States" in regulation and to clarify it as necessary in guidance. The EPA and the Corps of Engineers, who implements the Clean Water Act Section 404 permitting program, have relied on this authority to promulgate regulations and to issue clarifying guidance since the Clean Water Act was first enacted in 1972. Most recently, the Bush administration issued waters of the U.S. guidance in 2008 clarifying the effect of the Supreme Court decision in *Rapanos* and in 2003 clarifying the Supreme Court decision in *SWANCC*.

Vitter 2. It is also my understanding that under the draft Guidance, the Army Corps of Engineers and EPA would assert jurisdiction over tributaries, meaning "a natural, man-altered, or man-made water body" with an ordinary high water mark and including ditches that "drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water."

Vitter 2a. Does this regulatory assertion apply to virtually any ditch through which water flows?

Response: I understand the significance of this issue, particularly for the nation's farmers and for irrigators who rely on ditches to convey drainage or irrigation waters. The draft guidance would clarify that not all ditches are subject to regulation after the Supreme Court decision in *Rapanos*. Ditches, for example, excavated in uplands and that drain only uplands, or that do not connect to other waters of the U.S., are not subject to the Clean Water Act.

Vitter 2b. If not, how does the Guidance's purported tributaries jurisdiction comport with the plurality's opinion in Rapanos (which emphasized that jurisdictional waterbodies must be described "in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes'" (Rapanos, 547 U.S. at 739)), and with Justice Kennedy's concurrence in Rapanos (which recognized that "the breadth of [a] standard ... regulat[ing] drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it ... precludes its adoption" *(Rapanos,* 547 U.S. at 781 (Kennedy, J., concurring))?

Response: I appreciate the importance of this issue as the agencies work to implement the *Rapanos* decision consistent with the law. As the agencies' 2008 guidance did, the draft

Guidance clarifies that, after *Rapanos*, Clean Water Act jurisdiction over tributaries includes all "Traditional Navigable Waters" (TNW) and "Interstate Waters" and waters demonstrated on a case by case basis to have a "relatively permanent" flow of water (Plurality standard) or which possess a "significant nexus" with a TNW (Kennedy standard).

Vitter 3. The draft Guidance asserts that the precursor statutes to the CWA "always subjected interstate waters and their tributaries to federal jurisdiction."

Vitter 3a. Given that for a century prior to the CWA courts "interpreted the phrase 'navigable waters of the United States' in the [CWA's] predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible to being rendered so," *(See* Rapanos v. United States, 547 U.S. 715, 723 (2006) (plurality opinion)) is this assertion in the Guidance accurate?

Response: I recognize that this is an important legal question. If confirmed, I will raise this issue with the EPA General Counsel, the Department of the Army, and the Department of Justice to ensure that the guidance reflects their legal counsel. I will look forward to working with you as we clarify this issue.

Vitter 3b..Isn't it instead true that all interstate waters have never been subject to federal control, and that the exercise of federal jurisdiction over all interstate waters has no legal basis?

Response: I recognize that this is an important legal question. If confirmed, I will raise this issue with the EPA General Counsel, the Department of the Army, and the Department of Justice to ensure that the guidance effectively reflects their legal counsel. I will look forward to working with you as we clarify this issue.

Vitter 4. During your confirmation hearing you were asked about the following statement in an EPA fact sheet titled "Agriculture Exemptions Remain:" "This guidance does not address the regulatory exclusions from coverage under the CWA for waste treatment systems and prior converted cropland, or practices for identifying waste treatment systems and prior converted cropland." Referring to this statement in the fact sheet, Senator Fischer asked you about the status of the exemption for prior converted cropland. You testified that there is no attempt in the draft guidance or in any documents currently under consideration to in any way adversely affect the current exemption for prior converted cropland.

Vitter 4a. Is the same true for exemptions for waste treatment systems?

Response: It is my understanding that the agencies are not considering any changes to the waste treatment system exemption.

Vitter 4b. Is EPA attempting in the draft guidance or in any documents currently under consideration within the Agency (including a proposed rule, draft guidance, permit, or enforcement action) to in any way adversely affect the current exemption for waste treatment systems?

It is my understanding that the agencies are not considering any action that would adversely affect the application of the waste treatment system exemption.

Topic: EPA's Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters

Vitter 5. Mr. Kopocis, your office, the Office of Water, has requested the Office of Research and Development (ORD) to develop a report on the connectivity of streams and wetlands to downstream waters. I am told ORD confirmed that the draft report is COMPLETED and awaiting transmittal to the Science Advisory Board (SAB) panel for its review.

Vitter 5a. Under the Administrator's pledge, made during her confirmation hearings, to increase transparency, will you commit to releasing the report immediately so that the public can begin its review?

Vitter 5b. What public interest is served by embargoing the report?

Vitter 5c. I understand it is a large and complex report but what harm would there be in that approach?

Vitter 5d. Who decides whether the now completed draft should be made available to the public?

Response to Vitter 5a-d: I believe that transparency is a critical element of the EPA's work, especially in ensuring that its scientific products are of high quality. I understand that the draft science synthesis report drafted by the EPA's Office of Research and Development will be released soon by the EPA's Science Advisory Board. I share your commitment to transparency, and will commit to you that I will work with the Office of Research and Development, if confirmed, to ensure that the SAB conducts a robust scientific review and public comment process on the draft report and to ensure that the report is based on the best science.

Topic: EPA's Conductivity "Benchmark"

Vitter 6. While the U.S. District Court for the District of Columbia set aside EPA's conductivity "benchmark" that it had applied to Appalachian streams in the case of *NMA* v. *Jackson,* EPA recently published several papers supporting its conductivity actions, and has stated that it is in the process of developing a conductivity water quality criteria. In the past, EPA has failed to address scientific critiques that have produced evidence that conductivity is not a good indicator of benthic/aquatic health.

Vitter 6a. Going forward, what plans does EPA have to take this growing number of studies into account?

Response: I am unfamiliar with the specific studies outlined in your question. However, the agency continues to believe that conductivity is a high quality and cost effective water quality

measure that can help identify potential harm to the biological integrity of streams. I would be pleased to work with you, if confirmed, to learn more about the studies you reference and to ensure that the agency continues to base its work on the best, independently peer reviewed science.

Vitter 6b. How does EPA intend to convert a field-based study performed in Appalachian waters into a national standard?

Response: The EPA has made no decision at this time regarding how it may apply the peer-reviewed scientific research it has conducted in Appalachia on a national basis. I can assure you that any future agency action in this area would be subject to public comment and peer review.

Topic: EPA's Authority Under Section 404(c) of the CWA

Vitter 7. In March, 2012, the U.S. District Court for the District of Columbia struck down EPA's retroactive revocation of a mining-related CWA Section 404 permit, holding unequivocally that EPA has no authority to retroactively veto CWA Sec. 404 permits issued by the U.S. Army Corps of Engineers. However, EPA appealed that decision and in April of 2013, the U.S. Court of Appeals for the District of Columbia reversed the decision of the District Court.

What do you think the practical effect on industry will be of having Section 404 permits subject to EPA's veto authority even years after permit issuance and even if the permittee is in full compliance with the terms of the permit?

Response: I understand the important concerns raised by your question regarding the use of the EPA's Clean Water Act authorities and potential effects on the nation's business community. If I am confirmed, I look forward to working with you to ensure that the final court decision is implemented consistent with the law and in careful consideration of the issues you raise.

Vitter 8. During deliberations on the CWA in Congress, Senator Muskie noted that there are three essential elements to the CWA. These are "uniformity, finality, and enforceability." EPA Administrator Gina McCarthy likewise acknowledged the importance of providing permittees with a sense of finality upon permit issuance.

Vitter 8a.. How will you, in your capacity of Assistant Administrator of Water, work to implement the CWA in a manner that provides uniformity and finality throughout EPA's regulatory programs and permitting decisions.

Response: I appreciate your concerns regarding the importance of providing permittees with a sense of finality when their permits are issued. If confirmed, I will work to implement the Clean Water Act to provide the uniformity, finality, and enforceability that are so important in our regulatory programs.

Vitter 8b. How do the assertions made by EPA regarding the scope of its authority under Section 404 comport with the notion of permit finality?

Response: I appreciate your concerns regarding the importance of providing permittees with a sense of finality when their permits are issued. If confirmed, I will work to implement the Clean Water Act to provide the uniformity, finality, and enforceability that are so important in our regulatory programs.

Vitter 8c. Have you considered what effects EPA's actions might have on state Surface Mining Control and Reclamation Act (SMCRA) permitting programs?

Response: It is very important to me that EPA implements its responsibilities in coordination with our federal, state, and local partners, including our partners in state and federal SMCRA permit programs. If confirmed, I will make respectful coordination with our partners an Agency priority.

Topic: EPA's Draft Bristol Bay Watershed Assessment and Pebble Mine

Vitter 9.. The EPA's Bristol Bay Watershed Assessment looks to be a potential precursor to an unprecedented veto of a mining project even before the project proponent has had a chance to submit a permit application. Along with other Committee members, I recently asked the agency to explain what harm would result from the Agency allowing the normal regulatory process to play out, instead of its current approach of speculating on hypothetical mining scenarios. EPA's July 16, 2013, response contended that abandoning the prejudicial assessment and allowing the CWA and National Environmental Policy Act (NEPA) procedures to play out would "increase uncertainty among Bristol Bay stakeholders," even though it is EPA's prejudicial evaluation of the Pebble Mine project that caused the uncertainty in the region.

Vitter 9a. Why does EPA feel it cannot evaluate a project solely on its merits and only once an actual permit application is submitted?

Response: I appreciate your question and the need to provide certainty and predictability in the permit process. I understand that the agency began the Bristol Bay assessment in response to petitions from Alaskans concerned about potential impacts to valuable commercial, recreational, and subsistence resources. The EPA has expressed its intent to complete the assessment by the end of the year to avoid unnecessary delay. I believe that the information included in the assessment will be extremely helpful to other state and federal agencies, permit applicants, and the public as future large scale development in the watershed is considered. If confirmed, I look forward to working with you to use the final assessment in an effective and constructive manner.

Vitter 9b. List and explain all economic impact analyses the Agency has done in the region.

Response: The Bristol Bay Assessment is designed to evaluate the ecological resources of the watershed and assess potential environmental impacts resulting from future large scale development.

Vitter 9c. Specifically, can you speak to the unemployment rate and poverty-associated challenges that may or may not be alleviated for people in that part of Alaska with the mine as a potential income source – or is this a factor that EPA's analysis does not address?

Response: I appreciate your question and the importance of jobs and a healthy economy to communities in Bristol Bay and throughout Alaska. The challenge is to balance the contribution that large scale mining related economic development can have with the costs and impacts of such development on the valuable commercial, recreational, and subsistence salmon fishery in the watershed. The EPA is eager to provide relevant scientific information which can help to inform future decision making in the region. If confirmed, I look forward to working with our federal, state and local partners on these important issues.

Vitter 10. EPA's July 16, 2013, letter also called for the Pebble Mine proponents to submit their final mine plan.

Does EPA believe that project proponents do not have a right to decide for themselves when it is appropriate to begin the permitting process and when to submit their own permit application?

Response: I agree that project proponents should decide for themselves when it is best for them to submit an application for a Clean Water Act permit or to prepare a mine plan. In the current situation, it is my understanding that the ongoing EPA Bristol Bay Assessment should not prevent submission of a permit application or mine plan if the mining operator chooses to do so. If confirmed, I look forward to working with you to further clarify this issue as necessary.

Vitter 11. You indicated in your oral testimony that EPA "chose to not favorably respond" to a petition to preemptively veto the potential Pebble Mine project in Alaska. Your answer appears to leave open the possibility that EPA may still favorably respond to the petition at some point and preemptively veto the project before the project proponent submits its permitting applications.

Has EPA decided once and for all that it will not preemptively veto the Pebble Mine project?

Response: It is my understanding that the EPA has made no final decisions regarding use of the agency's 404(c) authority at Bristol Bay and will not do so until the final Assessment is completed. The agency has completed only 13 actions under Clean Water Act section 404(c) since enactment of the Clean Water Act in 1972 reflecting how carefully the EPA considers any potential use of this authority. I understand the importance of this issue to you and, if confirmed, look forward to keeping you informed as the Assessment is completed.

Vitter 12.. Also during your oral testimony, and in response to my question regarding how much money EPA has spent to date on the Bristol Bay Watershed Assessment, you indicated that EPA estimates it has spent through earlier this year approximately $2.4 million in external costs, but you did not know of an estimate of the internal costs to EPA.

Vitter 12a.. Is it true that EPA lacks an estimate or accounting for the internal costs spent on the watershed assessment?

Vitter 12b. If not, please provide the estimate.

Response to Vitter 12a-b: It is my understanding that an accounting of the total costs associated with the Bristol Bay Assessment will be conducted at the conclusion of the study. If confirmed, I will provide you with that information, including a summary of internal costs, when the study is completed. I appreciate the importance of this issue at a time when the agency is working hard to reduce expenses and assure taxpayers that their tax dollars are being spent wisely.

Topic: Proposed Rule for Cooling Water Intake Structures under Section 316(b) of the CW A and EPA's "Stated Preference Survey"

Vitter 13. Unlike programs for other media, water impacts are specific to the conditions present in individual waterbodies.

Vitter 13a. Given this premise, will the final Section 316(b) rule provide the necessary flexibility for state regulators to implement it based on local conditions?

Response: The agency is still working to develop final standards under section 316(b) for cooling water intake structures. However, I can assure you that, if confirmed, I will work to ensure that the agency has carefully considered the public comments it has received on the proposed standards and on the agency's 2012 Notices of Data Availability, and to ensure that the final standards are consistent with the Clean Water Act and provide appropriate flexibility.

Vitter 13b.. Also, will the Office of Water under your leadership shift direction and focus on the use of science instead of relying on flawed opinion surveys to develop unsupportable benefits positions when conducting economic analysis?

Response: If confirmed, I will ensure that the agency places science as the centerpiece of its work to protect the nation's waters. With respect to the stated preference survey that the agency released in mid-2012, the agency plans to seek review of the study from the EPA's Science Advisory Board, and to not rely upon the survey for any purpose until the SAB review is complete.

Vitter 14. How many human health impacts will be avoided if the proposed Section 316(b) standards are promulgated?

Response: The requirements of Section 316(b) of the Clean Water Act primarily relate to aquatic life. However, if confirmed, I will work to ensure that this and all Agency rules meet the appropriate scientific and legal standards with regard to all types of benefits.

Vitter 15. Can you please explain how utilizing the stated preference survey complies with the Data Quality Act and comports with the best available science?

Response: I am not familiar with the specific protocols that the agency used to develop and undertake its stated preference survey outlined in the agency's 2012 Notice of Data Availability (NODA). However, I believe the agency has done its best to ensure transparency in its efforts by publishing its results in the 2012 NODA, and by seeking future Science Advisory Board review of the survey results to ensure the quality of its approach.

Vitter 16. How does EPA intend to utilize its final stated preference survey report?

Response: I understand that the agency does not intend to utilize the stated preference survey until it is reviewed by the Science Advisory Board. The SAB review has not yet commenced, and the agency does not believe the SAB review will be complete by the agency's deadline for setting final standards pursuant to Section 316(b) of the Clean Water Act. I believe it is premature to speculate on how the agency's survey may be used in the future, but I can assure you that, if confirmed, I will ensure that the survey results are used only as appropriate.

Vitter 17. Will you please provide the charge questions EPA is submitting to the SAB with regard to the stated preference survey for the Section 316(b) rule?

Response: The agency has not yet submitted its charge questions to the SAB for its review of the agency's stated preference survey. However, I commit to you that the agency will ensure that these charge questions are publicly available at the time the SAB's review begins.

Vitter 18. Does EPA intend to create a new subcommittee or use the existing subcommittees?

Response: While I have not been specifically involved in the SAB process for the stated preference survey review, I believe the SAB may establish a new ad hoc expert panel to review the stated preference survey, consistent with the SAB's standard practice for conducting similar reviews.

Vitter 19. What is the purpose of seeking consultation from the Fish and Wildlife Service on 316(b)?

Response: I understand that the EPA is undertaking formal consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service pursuant to Section 7(a)(2) of the Endangered Species Act, and the implementing regulations at 50 C.F.R. § 402.14(c).

Vitter 20. How does EPA intend to use the Biological Evaluation?

Response: Under the consultation process, the EPA prepares a Biological Evaluation which we have provided to FWS. I believe it would be premature for me to speculate on the contents or use of the final outcomes of the endangered species consultation process that is currently underway. However, I commit to you that I will ensure that the final outcomes of this process are implemented consistent with the Clean Water Act and the Endangered Species Act.

Topic: Definition of "Fill Material"

Vitter 21. The current definition of fill material, finalized in May, 2002, unified the Corps and EPA's prior conflicting definitions so as to be consistent with each other and the structure of the CWA. The current rule solidifies decades of regulatory practice, and includes as fill material those materials that, when placed in waters of the U.S., have the effect of raising the bottom elevation or filling the water. However, while both EPA and the Corps have stated that they are now considering revising the definition of fill material, Acting Assistant Administrator for Water Nancy Stoner stated at a May 22, 2013, Subcommittee on Water Resources and Environment hearing that EPA is not actively involved in discussions with the Corps on revising the rule.

Vitter 21a. Will you commit to maintaining the current regulatory definition of fill material?

Response: I appreciate your concern about the importance of the regulatory term "fill material" and the implications regarding potential changes. It is my understanding that the EPA and the Corps are not actively discussing any revisions to the regulatory definition of this term. If confirmed, I would only very cautiously consider any rulemaking on this issue. I look forward to keeping you informed if there is further consideration among the agencies to revise the definition of fill.

Vitter 21b. What is EPA's rationale for potentially revisiting the well-established division of the Section 402 and Section 404 programs?

Response: Thank you for raising this important question. It is my understanding that concern focuses very narrowly on issues raised by recent litigation regarding the relationship between certain activities covered by existing Effluent Limitation Guidelines and regulation of these activities under Clean Water Act section 404. This issue was addressed in the Supreme Court decision in *Kensington* where the court noted remaining ambiguity regarding the 2002 rule regarding circumstances where discharges of fill material (e.g., mine tailings) may also be covered by an Effluent Limitation Guideline. The agencies, however, are not currently discussing the need for such a rule.

Vitter 21c. What specific problems is EPA seeking to address by revisiting the definition of fill material, and how exactly is EPA intending to address them?

Response: It is my understanding that the EPA has made no decision to revise the definition of fill material for any purpose. If confirmed, I look forward to keeping you informed if this decision is revisited.

Vitter 21d. Has EPA yet considered the time and costs associated with making such a change to the two major CWA permitting schemes – Sections 402 and 404?

Response: I appreciate your concern and fully recognize the potential implications of a significant change to the definition of "fill material." I emphasize that the agencies have made no decision to make any change to the existing regulatory term.

Topic: National Stormwater Discharge Rule

Vitter 22. I am happy to hear that EPA has decided to comply with CWA Section 402(p)(6) and will complete a study and submit to Congress a report on the necessity of new stormwater discharge rules under Section 402(p)(5) prior to issuing any new stormwater regulations. Please understand that this requirement is not a paper exercise. Notwithstanding this commitment, I am concerned that EPA fails to understand the purpose of this study and report and EPA's responsibilities and authorities under the CW A.

Vitter 22a. Do you agree that the potential regulation of additional sources of stormwater (other than sources identified in Section 402(p)(2)) is a complex issue of great interest to states, municipalities, small businesses, and other stakeholders?

Response: I understand the importance of the agency's stormwater rulemaking efforts to many stakeholders. If confirmed, I would work closely with stakeholders to ensure that the agency's stormwater rulemaking efforts are as transparent and collaborative as possible.

Vitter 22b. Do you agree that the development of the study and report to Congress under section 402(p)(5) should be an open and transparent process with stakeholder input, including the opportunity to comment on both a draft study and a draft report?
c. Do you agree that the study must be completed before a report is issued?

Response: I agree that the agency's work to update its stormwater regulations under the Clean Water Act should involve close coordination with states and other stakeholders. Although I have not been closely involved in the agency's work in this area, if confirmed, I look forward to making sure the agency complies with the Clean Water Act in its work to protect the quality of our nation's waters from stormwater discharges, and to promote transparency and public involvement in the agency's work.

Vitter 22d. Do you agree that the development of regulations under Section 402(p)(6) must be based on the results of studies under section 402(p)(5)?

Response: I agree.

Vitter 22e. Will you commit to me that you will comply with the CWA and suspend any stormwater rulemaking efforts until a study and report under Section 402(p)(5) are completed? Any rule that is developed without the benefit of the results of the study is ultra vires of EPA's authority under section 402(p)(6).

Response: If confirmed, I can assure you that the agency will fully comply with the Clean Water Act in its development of a report under Section 402(p)(5) and its development of a proposed stormwater rule under Section 402(p)(6).

Vitter 23. Do you agree that the CWA does not regulate the flow of water?

Response: In the Clean Water Act, Congress stated its objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and provided EPA and the States with an assortment of legal authorities. The decision how the EPA or a State will use these authorities to address a given issue involves very careful consideration of the facts unique to the situation. I commit to work with the EPA's Office of General Counsel and our Regional Offices to ensure that the EPA's use of these authorities is consistent with the words and objectives of the Clean Water Act.

Vitter 24. Do you agree that EPA can require permits under Section 402 only for discharges of pollutants from a point source to a water of the United States?

Response: Section 402 of the Clean Water Act applies to permits for discharges of any pollutant or combination of pollutants. As defined in Section 502 of the Clean Water Act, this includes discharges to "waters of the United States" from point sources, as well as discharges to waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft.

Vitter 25. Explain the purpose of EPA's new "National Stormwater Calculator," given the fact that this tool estimates the runoff of water, not the discharge of pollutants from a point source.

Response: I understand that the EPA's National Stormwater Calculator, released last week, is a desktop application that estimates the annual amount of rainwater and frequency of runoff from a specific site anywhere in the United States.

Vitter 26. Can you assure the Committee that this Calculator will not be used for any regulatory purpose, given the fact that the CWA does not regulate water?

Vitter 27. Can you assure this Committee that this Calculator will not be used to usurp the authority retained by States under Section 101(g) and will not in any way be used to affect the quantities of water within waters of a State?

Response to Vitter 26-27. I am not familiar with the specific design of the National Stormwater Calculator that the agency released last week. However, if confirmed, I commit to learning more about the Calculator, and will ensure that it and other tools are appropriately used by the EPA staff in their work to achieve the goals of the Clean Water Act and other laws.

Vitter 28. Can you assure me that EPA will not attempt to regulate water as a surrogate for a pollutant, in violation of the Eastern District of Virginia's recent decision in *VA Dept. of*

Transportation v. EPA (holding that EPA may not regulate stormwater as a surrogate for a pollutant)?

Response: The EPA did not appeal the decision of the District Court for the Eastern District of Virginia in *VA Dept. of Transportation* v. *EPA*. The EPA is continuing to analyze that decision as it works with states to develop options for establishing total maximum daily loads (TMDLs) under the Clean Water Act to address water quality impairments caused by urban stormwater. I commit to working closely with the EPA's Office of General Counsel and our Regional Offices to ensure that such TMDL efforts are consistent with the Clean Water Act.

Vitter 29. Unless EPA has decided to forego rulemaking under Section 402(p)(6), please explain to me why EPA has expended federal resources on the development of a Calculator, which has no regulatory purpose, while continuing to fail to comply with Section 402(p)(5).

Response: While I am not familiar with the specific design of the National Stormwater Calculator or its specific uses, I believe it is intended to serve a nonregulatory purpose by helping property owners, developers, landscapers, and urban planners make informed decisions to protect local waterways from pollution caused by stormwater runoff. Such tools can help the agency and its partners protect our nation's water resources in a collaborative, non-regulatory manner. If confirmed, I commit to learning more about the National Stormwater Calculator and other non-regulatory tools the agency has developed to ensure that they work effectively with other regulatory and nonregulatory efforts underway by the EPA, states, and other partners to protect water quality.

Topic: *Sackett* v. *EPA:*

Vitter 30. In *Sackett* v. *EPA*, the Supreme Court held that the Sackett family in Priest Lake, Idaho could obtain immediate judicial review of a CWA compliance order. I recognize that the Sacketts continue to fight the merits of EPA's compliance order in federal district court, but I would like to better understand the circumstances behind EPA's decision to deny the Sacketts their day in court in the first place.

Vitter 30a. Was it fair for the agency to give the Sacketts the so-called "option" of going through the CWA permitting process or awaiting civil prosecution just so that they could contest EPA's position that their land contained jurisdictional wetlands?

Vitter 30b. Did the EPA apologize to the Sacketts for denying them their day in court for more than four years?

Vitter 30c. If the agency has not or you do not know, can you make sure that EPA does indeed do so? An apology would at least demonstrate that the Agency has some understanding of the toll this case has taken on the Sacketts.

Response to Vitter 30a-c. As I understand the circumstances, the Supreme Court's ruling that compliance orders issued under Section 309 of the Clean Water Act were reviewable in court under the Administrative Procedure Act overturned the position of all five of the Courts of

Appeals that had previously considered this question. As a result, the EPA's previous position in the Sackett case was consistent with this precedent. The EPA is now making sure that recipients of Clean Water Act compliance orders are fully aware of their opportunity to seek pre-enforcement judicial review.

Vitter 31. If a landowner receives or obtains a jurisdictional determination from the EPA which indicates that his or her land is jurisdictional wetlands, may the landowner challenge the determination immediately in court if he or she believes the land is not jurisdictional wetlands?

Response: The U.S. Army Corps of Engineers is the lead agency for making jurisdictional decisions as a part of their permit. I appreciate the basis of this question and I defer to the Corps.

Vitter 32. If you are confirmed, will the Office of Water and EPA continue to prioritize the prosecution of small landowners who unwittingly cause little to no impacts to wetlands and other waterbodies, or will the Office of Water and EPA instead focus on actual and significant environmental threats?

Response: If confirmed I look forward to working with the agency's leadership to fully consider these issues.

Topic: Hydraulic Fracturing

Vitter 33. In 2010, EPA made an announcement on its webpage, without providing a notice and comment period, that requires underground injection control permits for diesel fuel related hydraulic fracturing. Subsequently, EPA proposed a draft guidance document detailing the regulatory program for hydraulic fracturing operations using diesel fuels. At no point has EPA acknowledged the congressional mandate in the Safe Drinking Water Act (SDWA) which states that EPA may not prescribe requirements which interfere with or impede the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations... unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

Vitter 33a. Does EPA intend to abide by the limitations imposed on EPA under the SDWA?

Response: Yes. If confirmed, I look forward to working with agency staff to ensure that the agency's actions regarding hydraulic fracturing are fully consistent with the Safe Drinking Water Act.

Vitter 33b. If yes, what evidence has EPA supplied that new regulations are essential to assure that underground sources of drinking water will not be endangered by such injection?

Vitter 33c. Has EPA undertaken any analysis related to current industry practices and has EPA considered the robust oil and natural gas regulatory programs in place at the state level?

Response to Vitter 33b-c. I do not believe the agency has proposed any new regulations under the Safe Drinking Water Act regarding diesel fuel hydraulic fracturing. Instead, the agency developed draft permitting guidance in 2012 for oil and gas hydraulic fracturing activities using diesel fuels, to help provide information useful in permitting the underground injection of oil- and gas-related hydraulic fracturing using diesel fuels where the EPA is the permitting authority. As the EPA has worked to develop the draft guidance, and as it reviews the more than 97,000 public comments it received on the draft guidance, I believe the agency is carefully considering states' efforts regarding hydraulic fracturing. Moreover, the EPA is interested to work with its state partners to ensure that hydraulic fracturing using diesel fuels is conducted in a way that protects human health and the environment while ensuring that natural gas can play a key role in our nation's clean energy future.

Vitter 33d. What has been your role and the role of the Office of Water with the ongoing EPA study on hydraulic fracturing?

Vitter 33e. When will the study be complete?

Vitter 33f. What is the status of prospective sites being tested for the study?

Response to Vitter 33d-f. The ongoing EPA Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources is being coordinated by the EPA's Office of Research and Development. As such, I have not been directly involved in developing or carrying out the study, and am not familiar with the status of specific case studies being conducted as part of the study. However, I understand that a draft report on the study will be available in 2014.

Topic: National Selenium Water Quality Criterion

Vitter 34. EPA is currently involved in a scientific assessment of selenium that will be used to propose a new national selenium water quality criterion. EPA has stated that it intends to put out its proposed criteria for public comment this coming fall. In response to her own confirmation questions, EPA Administrator Gina McCarthy committed to ensuring that EPA reviews technical comments it receives on any proposed selenium criteria document and makes appropriate revisions to ensure that any final criterion is of high quality.

Under your leadership, what would the Office of Water's strategy be for incorporating relevant scientific critiques and comments received into its final selenium criteria?

Response: I share your interest in ensuring that EPA's decisions regarding selenium are based consistently on the best available science that fairly and effectively takes into account technical critiques. If confirmed, I will work hard to make sure that any future agency decisions regarding selenium adhere to this principle. I understand that if and when the EPA proposes a revised proposed selenium criterion, that criterion would be available for public review and comment, and I commit to ensuring that the EPA reviews the technical comments it receives and makes appropriate revisions to ensure that any final criterion is of high quality.

Vitter 35. Administrator McCarthy further stated that EPA would work with industry to develop a national selenium criterion that satisfies technical standards while retaining appropriate site-specific flexibility.

How will EPA take the site-specific nature of selenium issues into account when developing its national criterion?

Response: I share your interest in ensuring that EPA consistently apply the highest scientific standards in the development of proposed national water quality criteria, including current efforts to revise the existing selenium criterion. If confirmed, I look forward to working with you to develop a national selenium criterion that the public can be confident satisfies these technical standards while retaining appropriate site-specific flexibility.

Topic: Effluent Limitation Guideline for Coalbed Methane Operations

Vitter 36. EPA continues to move forward with an effluent limitation guideline (ELG) for coalbed methane operations. Since the time that EPA began this initiative, the dynamics related to coalbed methane production have changed. EPA's ELG plan assumes natural gas prices in the range of approximately $7 mcf to over $9 mcf. Today the price of natural gas remains near $4 mcf. The low price of natural gas makes coal bed methane less economically competitive, resulting in a decrease in coalbed methane production. Additionally, most of the produced water production associated with coal bed methane operations occurs at the beginning of the production process because the coalseam must be dewatered to allow gas to flow to the surface. Therefore, with few new coalbed methane operations being contemplated, most of the coalbed methane produced water has already occurred.

In light of these dynamics, why is EPA's effort to promulgate a coalbed methane effluent limitation guideline a valuable exercise?

Response: EPA should make sure that its Clean Water Act rulemaking efforts continue to reflect changing economic and environmental circumstances. I understand that the agency announced in its final 2010 Effluent Limitations Guidelines plan that it was initiating two, separate rulemakings to address discharges from coalbed methane and from shale gas extraction. If confirmed, I commit to learning more about the agency's current rulemaking efforts, and to explore opportunities to ensure that the agency's development of effluent limitations guidelines for coalbed methane are based on the best-available science and economics, and are an efficient use of taxpayer dollars.

Topic: Standards for Perchlorate under the Safe Drinking Water Act (SDWA)

Vitter 37. As you are no doubt aware, the EPA Office of Water is in the midst of a rulemaking to set standards for perchlorate under the SDWA. Members of this Committee have had questions as to whether the risks presented by perchlorate justify the extensive resources that EPA has invested to date in this controversial rulemaking. Most recently, the SAB questioned EPA's entire approach for setting this standard and recommended that the Agency use a different methodology.

Vitter 37a. If you are confirmed, will you assure us that you will undertake a thorough and independent assessment of this rulemaking and determine whether regulating perchlorate under the SDWA is a rational and reasonable use of the Agency's limited resources?

Response: If confirmed, I commit to learning more about the status of the agency's work to develop a drinking water standard for perchlorate, including the advice recently provided to the agency by the Science Advisory Board, and will work with Administrator McCarthy to ensure that the agency develops an appropriate and protective drinking water standard for perchlorate.

Vitter 37b. If you determine that regulating perchlorate under the SDWA is a rational and reasonable use of the Agency's limited resources will you provide an explanation of other EPA priorities that will need to be delayed or abandoned in order to finalize the perchlorate MCL?

Response: I understand that former EPA Administrator Jackson determined in February 2011 that regulating perchlorate under the Safe Drinking Water Act (SDWA) was appropriate, based on the statutory factors outlined in SDWA, and that the agency is currently working to develop a drinking water standard for perchlorate. While I do not believe that continued work on perchlorate would displace any current activities in the Office of Water, if confirmed, I am interested to learn more about the agency's efforts and to ensure that its work on perchlorate does not impede other priorities of the Office of Water.

Topic: *Iowa League of Cities v. EPA*

Vitter 38. In *Iowa League of Cities v. EPA,* the Eighth Circuit determined that two letters from EPA to Senator Grassley regarding wastewater treatment processes were the equivalent of regulations. Both were vacated as procedurally invalid. However, it has come to my attention that EPA believes that *Iowa League of Cities* was wrongly decided and may attempt to limit this decision to the Eighth Circuit. EPA must recognize the need for transparency and predictability in the regulatory system and go through the proper administrative channels to clarify or develop new rules with respect to wastewater treatment and other activities.

Accordingly, will you commit to applying the *Iowa League of Cities* decision nationally?

Response: If confirmed, I look forward to working with the agency's leadership to fully consider these issues. The Eighth Circuit denied the EPA's petition for en banc rehearing of the decision; however, the matter is still in litigation. Once the litigation is resolved, I hope to carefully consider the next steps for addressing these issues.

Topic: *NMA v. Jackson*

Vitter 39. The U.S. District Court for the District of Columbia in the case of *NMA v. Jackson* (now *NMA v. Perciasepe* on appeal) recently struck down several EPA actions-

specifically, EPA's Enhanced Coordination Process (ECP) and Multi-Criteria Integrated Resource Assessment (MCIR) for Appalachia surface coal mining, as well as EPA's guidance document, "Improving EPA Review of Appalachian Surface Coal Mining Operations Under the CWA, National Environmental Policy Act, and the Environmental Justice Executive Order"- as violating the CWA and Administrative Procedure Act (APA), as well as, in the case of the guidance document, the Surface Mining Control and Reclamation Act. Administrator McCarthy stated that EPA has directed its field offices not to use the guidance documents impacted by the court decision and instead to rely on regulations promulgated under the APA.

What future actions does EPA intend to take to ensure that the court's decision is fully implemented?

Response: I appreciate your interest in this important matter. Although the agency's appeal of the District Court's decision is pending, I understand that the agency has directed its field offices not to use the guidance documents affected by the court decision. If confirmed, I will continue to follow this approach as the EPA waits for a final decision of the court in this matter.

Senator Inhofe

Inhofe 1. According to the Office of Information and Regulatory Affairs' (OIRA) website controversial EPA draft guidance called "Clean Water Protection Guidance" has been undergoing White House review since February 2012. One of the more controversial concepts contained in the EPA draft is how EPA could assert federal jurisdiction over any isolated wetland "if the Agency found a "significant nexus" between the isolated wetland and a traditional navigable water (TNW) or interstate waters (IW) based upon a so called biological or ecological connection. This biological or ecological connection between an isolated wetland and a TNW or IW can form the basis of EPA's "significant nexus" test as to why an otherwise isolated wetlands or even categories of land features known as "other waters" (i.e., intermittent stream, wet meadow, playa lake, prairie potholes, etc.), could be found by EPA/Corps to be jurisdictional under the CWA.

In 2011, the U.S. Fish & Wildlife Service (Service) entered into a voluntary legal settlement with just two environmental groups. Under terms of that legal settlement, the Service is scheduled to make hundreds of species listing determinations and designation of critical habitat under Endangered Species Act (ESA) over the next three years including hundreds of aquatic species (fish, mussels, and amphibians). Private landowners, whose property has been designated as critical habitat for an endangered or threatened species under ESA, face the risk of having their property subject to the ESA's regulatory and permitting requirements. However, under EPA's draft "Clean Water Protection Guidance" these same landowners also face having otherwise non-jurisdictional isolated wetlands becoming jurisdictional wetlands because of this presumed biological or ecological connection.

Under the pending draft Clean Water Act guidance how might the designation of critical habitat by the Service under the ESA; impact how EPA applies the "significant nexus" when evaluating whether an otherwise isolated wetland would become a jurisdictional wetland under the Clean Water Act (CWA)?

Response: Potential Clean Water Act jurisdiction over "other waters" is a very important issue and, if confirmed, one that I will pay close attention to, recognizing its implications for farmers and other land owners. As I understand the draft guidance, it is intended to clarify and explain the statutory requirements and it would not change the existing statutory and regulatory basis for the case by case evaluation now required to determine whether or not a significant nexus is present. As a result, I do not anticipate that the guidance, if issued, would result in a significant change, if any, to current practices regarding "other waters."

Inhofe 2. EPA is developing a national stormwater rulemaking for new and redeveloped sites that will require retention of stormwater, and expand the stormwater programs for MS4's and States. MS4's have programs to manage stormwater from new and redeveloped sites, yet EPA's new regulation will continue to target States and thousands of local governments that do not have the resources to appropriately implement and enforce the existing construction stormwater program, much less a substantially expanded program contemplated by the national stormwater rulemaking.

In developing this new regulation, how does EPA plan to minimize the burden on property owners, developers, state and local government that are already struggling to meet the existing regulatory requirements?

Response: The agency should do all it can to minimize the burden on property owners, developers, states, and local governments as the agency works to protect water quality from the effects of stormwater discharges. While the agency has not developed a proposed stormwater regulation, the agency is considering opportunities to provide flexibility for cities and counties that have protective stormwater programs. If confirmed, I look forward to learning more about the agency's work to develop a stormwater rule, and will seek opportunities to minimize burden while ensuring adequate protection for public health and the environment.

Inhofe 3. EPA is seeking to justify its costly proposed 316(b) rule, which would affect more than 1,260 power plants and industrial facilities nationwide, on the basis of a mail-in public opinion survey asking "how much" a random group of individuals would be willing to pay to reduce harm to fish at cooling water intakes. This willingness-to-pay approach to determining "benefits" contrasts sharply with the far more traditional approach used by EPA in its earlier 316(b) rulemakings and other rulemakings. The earlier analyses relied on actual market prices and costs incurred by individuals, rather than hypothetical questions in a public survey. The "willingness-to-pay" or "stated preference" survey is clearly intended to increase the anticipated benefits of the proposed rule and justify costly controls, such as cooling towers. Using such unreliable benefit estimates will inappropriately lead to extremely expensive cooling water controls that would cause additional plants to shutter. Recall that in October 2010 NERC issued a report concluding that 316(b) could have economic impacts nearly three times greater than the combination of the Cross State Air Pollution Rule and the Mercury and Air Taxis Standards. See NERC, 2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations (October 2010).

Given all these problems, would you support withdrawing the survey and clarifying that the survey and its results are inappropriate to use in justifying the final rule or requirements at individual facilities?

Response: The studies on which the EPA relies should be of high quality and should be used only in appropriate circumstances. With respect to the agency's stated preference survey regarding 316(b), I understand that the agency does not intend to utilize the stated preference survey until it is reviewed by the Science Advisory Board. The SAB review has not yet commenced, and the agency does not believe the SAB review will be complete before the EPA publishes final standards pursuant to Section 316(b) of the Clean Water Act. I believe it is premature to speculate on how the agency's survey may be used in the future, but I can assure you that, if confirmed, I will ensure that the survey results are used only as appropriate.

Inhofe 4. In EPA's proposed 316(b) rule EPA has adopted starkly different approaches to managing "impingement" and "entrainment" at existing cooling water intake structures. For entrainment, EPA appropriately adopted a site-specific approach, recognizing that (a) existing facilities already have measures in place to protect fish, (b) further measures may or may not be needed, and (c) the costs, benefits, and feasibility of such measures have to be evaluated at each

site. Yet for impingement, EPA adopted rigid, nationwide numeric criteria that appear unworkable and in many cases unnecessary. In a notice of data availability issued last year, EPA signaled that it would consider a more flexible approach for impingement.

In the final rule that is due this fall, would you support replacing the original impingement proposal with a more flexible approach that pre-approves multiple technology options and allows facility owners to propose alternatives to those options if the costs of additional measures would outweigh benefits?

Response: It is my understanding that the EPA explicitly discussed possible changes to the proposed 316(b) rule's impingement standard in the NODA published in the Federal Register on June 11, 2012, and that the EPA is carefully reviewing those comments as it develops the final rule. If confirmed, I would be willing to look closely at flexibilities for compliance with the impingement standard.

Senator Barrasso

Barrasso 1. Is there anything you disagree with regarding the proposed Clean Water Act jurisdictional guidance?

Response: I understand your interest in the important issues associated with the preparation and issuance of guidance regarding the scope of Clean Water Act jurisdiction. The EPA and the U.S. Army Corps of Engineers are now implementing jurisdiction guidance issued during the previous administration in 2008. The agencies' goal is to improve upon that guidance and to reduce existing costs and delays associated with identifying waters of the U.S. Since coming to the agency, I supported additional improvements to the guidance that will help to enhance predictability and improve consistency with the Supreme Court decision in *Rapanos*.

Barrasso. If confirmed, will you continue EPA's practice of using guidance to make major policy decisions regarding the Clean Water Act, or other federal laws under your jurisdiction, as opposed to going to Congress to seek changes?

Response: If confirmed, I will work to ensure that any changes to the EPA regulations are promulgated consistent with the requirements of the Administrative Procedures Act. I share your interest in using guidance not to establish new law, but only to clarify existing requirements established by the Congress or through APA rulemaking. Having worked on the hill for so many years, I understand the legislative responsibilities reserved expressly for the Congress under the Constitution and will continue to respect that role if confirmed into my new position in the Executive Branch.

Barrasso 3. What is your understanding of the role Congress plays versus the EPA in terms of who makes the laws?

Response: I have spent nearly my entire career working in either the Senate or the House of Representatives of the U.S. Congress. I have great respect for the role of the Congress under the Constitution to enact the nation's laws and will continue to respect that role if confirmed into my new position in the Executive Branch. The critical role of the EPA, like other executive branch agencies, is to carry out the law as enacted by the Congress, including writing regulations to implement the law. I look forward to working with you, if confirmed, as the EPA implements the law as enacted by the Congress.

Barrasso 4. Do you think Congress originally wanted EPA to regulate ephemeral streams that only have water in them during rain fall events?

Response: The scope of Clean Water Act jurisdiction has been widely debated and litigated since enactment of the statute in 1972. The courts have generally supported a broad interpretation of the geographic scope of the Act. Supreme Court decisions in *Rapanos* and *SWANCC* have created uncertainty regarding the scope of the Clean Water Act. Since these decisions, the agencies' interpretation of the law has been widely upheld, which includes jurisdiction, in some circumstances, over tributaries with ephemeral flow. If confirmed, I will

work to ensure that the reach of the Clean Water Act is consistent with the law, including the Supreme Court decisions in *SWANCC* and *Rapanos*.

Barrasso 5. Do you believe Congress provided limits to federal authority in the Clean Water Act? Please explain in detail what those limits are.

Response: I believe the Congress did intend limits to federal authority under the Clean Water Act. I recognize that the Congress enacted the Clean Water Act to provide the EPA with the authority to protect public health and the environment. I understand the limitations inherent in that authority and the EPA's focus on restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, which expressly excludes superseding the role of states, for example, in allocating water quantity.

Barrasso 6. The EPA and the Corps affirm that the Clean Water Act Jurisdictional Guidance will result in an increase in jurisdictional determinations which will result in an increased need for permits. How many more EPA personnel and taxpayer funds will be needed to implement this guidance if it goes forward?

Response: It is the agencies' goal in developing new jurisdictional guidance to reduce existing delays, uncertainty and associated costs for permit applicants and the government by simplifying and clarifying the procedures for conducting jurisdictional determinations. If confirmed, I look forward to coordinating with you as we work to achieve this important goal.

Barrasso 7. Do you believe that additional regulatory costs associated with changes in jurisdiction and increases in permits will erect bureaucratic barriers to economic growth, negatively impacting farms, small businesses, commercial development, road construction and energy production?

Response: The EPA's economic analyses find that the guidance will result in a net economic gain, including as a result of reduced costs associated with conducting jurisdictional determinations and maintaining protection for the nation's sources of clean water. The EPA also discussed with the Small Business Administration the potential impacts of the guidance on the nation's small business community. If confirmed, I will work with my federal and state partners to limit any negative economic effects of the guidance and promote effects that reduce existing costs and delays and improve national consistency and predictability.

Barrasso 8. Do you believe that expanding federal control over intrastate waters will substantially interfere with the ability of individual landowners to use their property? If not, why not?

Response: No. It is my understanding, based on an analysis of the draft guidance conducted by the U.S. Army Corps of Engineers, that the guidance would not significantly change the current geographic scope of Clean Water Act jurisdiction, and will not restore it to its scope prior to the Supreme Court decisions in *SWANCC* and *Rapanos*. If confirmed, I look forward to working with you to ensure that the voices of individual landowners are heard and respected.

Barrasso 9. Since the Supreme Court's decision in Sackett v. EPA, the EPA has recognized that recipients of Clean Water Act compliance orders are entitled to immediate judicial review of the orders. If you are confirmed, will you ensure that EPA also recognizes that recipients of Clean Water Act jurisdictional determinations are also entitled to immediate judicial review?

Response: I understand the importance of this question as the agencies work to apply the decision in *Sackett* v. *EPA*. As a general matter, however, the EPA does not conduct jurisdictional determinations for landowners seeking Clean Water Act permits. Under Clean Water Act section 404, jurisdictional determinations are performed by the U.S. Army Corps of Engineers. If confirmed, I would be glad to work with you and the Corps of Engineers to address this key issue.

Senator Sessions

Sessions 1. I am informed that EPA is seeking to justify its proposed 316(b) rule, which would affect more than 1,260 power plants and industrial facilities nationwide, on the basis of a mail-in public opinion survey asking "how much" a random group of individuals would be "willing to pay" to reduce harm to fish at cooling water intakes. It is my understanding that this "willingness-to-pay" approach to determining "benefits" contrasts sharply with EPA's traditional approach used by EPA in its earlier 316(b) rulemakings and other rulemakings. The earlier analyses relied on actual market prices and costs incurred by individuals, rather than hypothetical questions in a public survey. It seems that this "willingness-to-pay" or "stated preference" survey is intended by EPA to increase the anticipated benefits of the proposed rule and justify costly controls, such as cooling towers. I am concerned that using unreliable benefit estimates could add unwarranted costs on power plants that could cause additional plants to shut down. I am informed that, in October 2010, NERC issued a report concluding that 316(b) could have economic impacts nearly three times greater than the combination of the Cross State Air Pollution Rule and the Mercury and Air Toxics Standards. See NERC, 2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations (October 2010). Given these concerns, would you support withdrawing the "willingness-to-pay survey" and clarifying that the survey and its results are inappropriate to use in justifying the final rule or requirements at individual facilities?

Response: The NERC's hypothetical analysis assumed that states will choose to mandate that all affected plants install cooling towers, even if this leads to plant retirements causing reliability problems. The EPA did not propose a "one-size fits all" approach for entrainment for its 316(b) rule; instead, the EPA proposed a site-specific approach to entrainment. My understanding is that the EPA did not propose a uniform closed-cycle cooling requirement based on consideration of possible local energy reliability concerns, air quality issues, geographical constraints on the installation of closed-cycle cooling and facilities with a limited remaining useful plant life.

Sessions 2. I am informed that, in EPA's proposed 316(b) rule, EPA has adopted starkly different approaches to managing "impingement" and "entrainment" at existing cooling water intake structures. For entrainment, it is my understanding that EPA adopted a site-specific approach, recognizing that (a) existing facilities already have measures in place to protect fish, (b) further measures may or may not be needed, and (c) the costs, benefits, and feasibility of such measures have to be evaluated at each site. This seems appropriate. Yet for impingement, I am told that EPA adopted rigid, nationwide numeric criteria that appear unworkable and in many cases unnecessary. In a notice of data availability issued last year, EPA signaled that it would consider a more flexible approach for impingement. In the final rule that is due this fall, would you support replacing the original impingement proposal with a more flexible approach that pre-approves multiple technology options and allows facility owners to propose alternatives to those options if the costs of additional measures would outweigh benefits?

Response: It is my understanding that the EPA explicitly discussed possible changes to the proposed 316(b) rule's impingement standard in the NODA published in the Federal Register on June 11, 2012 and that the EPA is carefully reviewing those comments as it develops the

final rule. If confirmed, I would be willing to look closely at flexibilities for compliance with the impingement standard.

Sessions 3. During Administrator McCarthy's confirmation process, I expressed concerns about EPA's continuation of efforts to establish effluent limitation guidelines (ELG) for coalbed methane (CBM) production. In her responses to my QFRs, she wrote: "I understand the importance of your questions to natural gas producers in Alabama and elsewhere. I have not been directly involved in this CWA issue, but if confirmed, I look forward to working with you as EPA looks at this important issue under the CWA." Do you, also, commit to work with me and my staff on this issue and to keep us closely apprised of all EPA actions on this matter?

Response: If confirmed, I commit to working with you to keep you and other members of the committee informed of these efforts.

Sessions 4. As outlined in my letter to the EPA dated May 10, 2012, the ELG process, which started in 2008, cannot be justified in light of prevailing economic conditions and the price of natural gas in today's market. Natural gas prices are much lower now than in 2008 when EPA started this process. Moreover, I am advised that there is no need for these ELGs because Alabama has successfully managed the National Pollutant Discharge Elimination System (NPDES) for more than 25 years with EPA regional supervision, and that an ELG is even less necessary now because of decreased gas and water production. A CBM ELG would threaten production across the country and could even end production in Alabama, thereby harming the great progress this country has made toward energy independence and progress in domestic natural gas production. I appreciate EPA's response dated June 12, 2012, that acknowledges the ELG must be economically achievable. The EPA has been working on a proposed rule regarding effluent limitation guidelines (ELG) for CBM since 2008. During that time, natural gas prices have decreased significantly. I am told that this dynamic renders a CBM ELG economically unachievable. Rather than devoting additional time and resources to an effort that the EPA cannot justify- economically or on the merits- I encourage you to abandon any efforts to establish a CBM ELG. Please provide an update on this process. Does EPA intend to continue this ELG process even though EPA acknowledges that it cannot issue new guidelines if they are economically unachievable? What are the costs to EPA of the entire ELG process for coalbed methane? I am told that EPA has actively been working on the CBM ELG since 2007 including an extensive survey of companies and that, to date, no economic information has been provided to the public even though the Clean Water Act requires an economic feasibility test. When can stakeholders expect to see such an analysis?

Response: The EPA should make sure that its Clean Water Act rulemaking efforts continue to reflect changing economic and environmental circumstances. I understand that the agency announced in its final 2010 Effluent Limitations Guidelines plan that it was initiating two, separate rulemakings to address discharges from coalbed methane and from shale gas extraction. If confirmed, I commit to learning more about the agency's current rulemaking efforts, including the cost of such efforts, and to explore opportunities to ensure that the agency's development of effluent limitations guidelines for coalbed methane are based on the best-available science and economics, and are an efficient use of taxpayer dollars. Moreover, I commit to ensuring that any proposed standards published by the agency comply with the Clean

Water Act as to technological and economic feasibility, and that the information on which the agency relies is made publicly available.

Senator Wicker

Wicker 1. What do you think the geographic scope for the award of RESTORE Act funds should be and why?

Response: I believe that the RESTORE Act provides clear priorities for selecting projects and programs for inclusion in the Comprehensive Plan published by the Restoration Council, which are to protect and restore the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches and coastal wetlands of the Gulf Coast Region. The federal members of the RESTORE Council are currently developing a unified position on the appropriate geographic scope of the RESTORE Act, consistent with the direction provided by Congress. If confirmed, I look forward to working together with all members of the Council, consistent with the RESTORE Act, to determine which projects and programs are ultimately selected through the Comprehensive Plan for funding and implementation

Wicker 2. How much control do you think the States should have over the selection of projects for the 35% of Gulf Coast Restoration Trust Fund contents that are to be divided among the Gulf States?

Response: I believe the RESTORE Act provides significant flexibility for states to select projects from a broad range of eligible project categories funded by the 35% of RESTORE Act funds that are divided equally among the Gulf states under the Direct Component.

Senator Boozman

Boozman 1. As you know, the EPA has inappropriately released personal and confidential business information relating to concentrated animal feeding operations (CAFOs) to certain activist organizations. (Amanda Peterka, EPA probes release of CAFO data to enviro groups, Mar. 6, 2013, http://www.eenews.net/Greenwire/2013103106/archive/2?term=EPA+probes+release+of+CAFO+data+to+enviro+groups). Earlier this year, I asked the EPA whether Arkansans were directly impacted by the Agency's careless disregard for legitimate privacy concerns during this incident. The Agency responded that "Arkansas is one of the 19 states for which the data was either: (1) available to the public on websites, (2) is subject to mandatory disclosure under state or federal law, or (3) does not contain data that implicated a privacy interest; the data from these nineteen states is therefore not subject to withholding under the privacy protections of FOIA Exemption 6." This implies that Arkansans were directly impacted, but it leads to further questions and concerns. The EPA seems to claim that there was no legal obligation to keep the Arkansas-related information confidential. Even so, the release of this information to activist groups inappropriately paints a target on Arkansans. As you know, the Department of Homeland Security had previously informed the EPA that the release of such information could constitute a domestic security risk. Would you please explain your views on (1) whether it was appropriate for the Agency to release the personal and confidential business information of Arkansans to activist organizations, (2) whether the agency could have met its FOIA obligations in this case without directly releasing Arkansas-related information to activist organizations?

Response: The agency should treat with utmost seriousness the task of protecting the privacy of Americans recognized by the Freedom of Information Act, the Privacy Act, and the EPA's Privacy Policy. I am not familiar with the specifics of the Arkansas data that were released pursuant to the Freedom of Information Act earlier this year. However, I commit to you that, if confirmed, I will work hard with the agricultural community to rebuild trust between the EPA and America's farmers. Moreover, I will work hard to ensure that the EPA appropriately protects the information provided to it by states regarding our nation's farmers.

Boozman 2. For many years, Congress has required EPA to support partnerships with non-federal entities, like the Water Systems Council, that help sustain safe drinking water sources for rural Americans who rely on groundwater. Please describe your views regarding the EPA's role in providing support for improved water quality and water systems to rural communities. Specifically, please address the EPA's role in supporting programs that provide training and technical assistance to citizens and communities that rely on individual water wells and small water well systems.

Response: If confirmed, I would strongly support the EPA utilizing the various tools provided under the Safe Drinking Water Act (SDWA) to enable EPA and our state partners to better target our resources and technical assistance toward improving small system sustainability. I believe that the EPA should strive to improve the protection of human health and make America's small water systems sustainable through financing public water system infrastructure; working with states to strengthen the SDWA Capacity Development Program to

improve system sustainability; and targeting technical assistance to promote water system partnerships.

If confirmed, I would also support the EPA's continued work with the U.S. Department of Agriculture (USDA)'s Rural Development – Rural Utilities Service to support increasing the sustainability of drinking water systems nationwide to ensure the protection of public health and water quality. I would also support continued grant funding to provide training and technical assistance to urban and rural drinking and wastewater systems and private well owners. Ensuring that the EPA does all it can to provide safe drinking water to rural communities would be a priority if I am confirmed as Assistant Administrator for Water.

Boozman 3. I'm sure you're familiar with OMB circulars that are provided to instruct agencies on the proper way to carry out regulatory analysis. For example, OMB Circular A-4 states that "a real discount rate of 7 percent should be used as a base-case for regulatory analysis." This circular also states that "analysis of economically significant proposed and final regulations from the domestic perspective is required, while analysis from the international perspective is optional." Do you believe it is important for agencies to follow OMB instructions to ensure that regulatory analysis is conducted in a consistent manner?

Response: I believe it is important for agencies to follow the OMB guidance to ensure that regulatory analysis is conducted in a consistent manner. If confirmed, I look forward to working to ensure that the analyses the agency conducts for water related rulemakings are consistent with this OMB guidance.

Boozman 4. In assessing the benefits and costs of a regulatory policy, do you believe that EPA should evaluate domestic costs and domestic benefits separately from global/international costs and benefits? In other words, do you think standard practice should be to separate out the benefits to and costs to American citizens of a particular regulatory policy, so that those costs and benefits can be independently evaluated?

Response: An effective regulatory analysis is designed to inform the public and other parts of the government about the expected impacts of a regulatory action. For the vast majority of benefits from Clean Water Act rules, I believe that the EPA's analysis would focus on the benefits that accrue from cleaner water within the U.S.

Boozman 5. This Committee has heard testimony this year- from both scientists and policy-makers- that narrative nutrient criteria, properly structured, can effectively protect water quality to meet designated uses. If confirmed, would you seek to use EPA power or resources to impose numeric nutrient criteria on states? Or, if confirmed, would you support EPA cooperation with states that would prefer to maintain narrative nutrient criteria?

Response: If confirmed, I would actively support the EPA's ongoing cooperation with states to ensure that they effectively address the challenges posed by nutrient pollution. Both numeric and narrative nutrient criteria can be critical tools for helping states to address nutrient pollution, and I believe that we are most effective where the EPA and states work together to address nutrient pollution challenges.

Boozman 6. As you know, EPA Region 6 is working on the Illinois River Watershed Modeling Project with a possible TMDL process to follow in Arkansas and Oklahoma. Earlier this year, the States of Arkansas and Oklahoma signed a Second Statement of Joint Principles and Actions. This bi-state agreement provides a three-year extension of existing commitments-which have led to significant decreases in flow-adjusted monthly phosphorous loads over time-while the states jointly perform a stressor-response study, funded by the State of Arkansas and managed by a committee appointed, in equal numbers, by each state. The States of Arkansas and Oklahoma agree to be bound by the findings of the Joint Study. Specifically, Arkansas agrees to fully comply with the standard at the state line, whether the existing standard is confirmed or a new standard is established. Given this bi-state agreement, Senator Pryor, Congressman Womack, and I have urged the EPA to continue working on the model but to also postpone TMDL development until after the joint statement obligations are completed. Do you have any thoughts on this approach? And will you agree to work closely with our state officials on these types of issues?

Response: Although I am not familiar with the specifics of this effort, I am encouraged by the agreement between the States of Arkansas and Oklahoma on this issue. I understand that the EPA continues to work with Oklahoma and Arkansas; affected tribes; and other interested parties to develop a comprehensive water quality model of the watershed. If confirmed, I look forward to learning more about these ongoing efforts, and agree to work closely with my colleagues in the EPA Region 6 office and with state officials on this and other issues of mutual interest.

Boozman 7. Some activists seek to use Office of Water programs to address climate change by, for example, urging that resources be set aside for "green" water projects that reduce emissions. Do you believe that reduced emissions should be a higher priority for the Office of Water than clean water? Specifically, if forced to choose, would you rather spend limited resources on more-expensive projects that result in fewer emissions but also reduce water quality improvement capacity, or would you rather stretch tax dollars further to maximize the quantity and effectiveness of water quality protection infrastructure?

Response: Ensuring clean water is the primary mission of the Office of Water and the laws that it implements. However, where there are opportunities to achieve clean water benefits as well as other environmental, public health and community benefits, the agency should pursue an approach that achieves both. Such an approach can help create efficiencies and help ensure greater benefits for each dollar spent on our nation's infrastructure.

Boozman 8. Too often the EPA takes actions that lead to distrust in rural farming communities. While most farmers want to be good stewards of land and water, they often distrust government programs, even voluntary programs, and rightfully so. EPA can make choices that seriously impact rural participation in voluntary conservation and environmental protection efforts. For example, hypothetically speaking, in helping to set-up voluntary nutrient trading programs, EPA could choose to support non-point source reduction verification through USDA-led (or state agricultural agency-led) verification of the implementation of best management practices by non-point sources that choose to participate. Or, EPA could choose to push for site-specific,

"on-field" water quality monitoring. What are your thoughts on these issues, and what steps would you take to earn trust in rural and agricultural communities?

Response: The EPA's work to ensure clean water is best pursued in close collaboration with states, other federal agencies, and stakeholders, and I share Administrator McCarthy's commitment to strengthening the EPA's relationship with rural America as EPA works to protect human health and the environment. With respect to nutrient trading, I understand the potential concerns that our nation's farmers may have about their participation in water quality programs, but believe that the EPA can do more, in coordination with the USDA and other agencies, to encourage their voluntary participation. The USDA has strong, on the ground relationships with our nation's farmers, and if confirmed, I would work to identify how the EPA's work under the Clean Water Act and Safe Drinking Water Act can leverage these relationships to the maximum possible extent to improve communication, trust, and on the ground results.

Boozman 9. Will you initiate any interagency communications or coordination with USDA and other federal and state entities to ensure that the costs and burdens on American farmers and rural communities are fully considered by the EPA? If so, please describe any permanent protocols or practices that you would put in place to ensure that such communication and coordination continues throughout your tenure.

Response: I share your interest in assuring that the EPA carefully considers potential impacts on our nation's farmers and rural communities as it works to provide clean water. If confirmed, one of my first priorities would be to further strengthen the agency's relationship with the USDA to ensure that the interests of our nation's farmers and ranchers are incorporated into the agency's decision-making process. I believe my first step in this effort, if confirmed, would be to become more familiar with the ways in which the EPA and the USDA currently collaborate, and to identify specific ways in which the agency could strengthen and formalize those partnerships. If confirmed, I would be pleased to provide you an update on this work, including specific opportunities that I identify for closer collaboration in the area of assessing potential impacts to America's farmers.

Boozman 10. If confirmed, you will receive periodic oversight letters from the Environment and Public Works Committee. As the Ranking Member of the Water and Wildlife Subcommittee, I suspect that I will send you letters seeking information that is critical to the formulation of public policy. This oversight is critical as we seek to evaluate the effectiveness of government programs and policies, as we work to identify and eliminate wasteful government practices, and as we labor to eliminate fraud, corruption, abuse, and other forms of misconduct. Please describe your views regarding the importance of timely responses to legislative branch inquiries. If confirmed, what will you do to ensure that you and your office respond in a thorough and timely manner to legislative branch inquiries? Please be specific.

Response: If confirmed, I look forward to working closely with you and your colleagues on the Environment and Public Works Committee, and others in the Congress, to effectively implement our nation's clean water laws. My significant experience on Capitol Hill has demonstrated to me the importance of developing a constructive working

relationship between the executive and legislative branches. If confirmed, I will work closely with my colleagues at the EPA to ensure that inquiries from you or others in the Congress are addressed in a timely and comprehensive manner.

Senator Fischer

Prior Converted Cropland

In response to one of my questions at your confirmation hearing, you stated, if a farmer changed the use of his or her prior converted cropland (PCC) from an agricultural to a non-agricultural use, the new use would need to fall under one of the Clean Water Act (CWA) 404(f) agricultural exemptions to avoid the need for a CWA permit. Ibelieve your response is not consistent with EPA and Corps regulations or with judicial precedent.

In 2010 and 2011, the U.S. District Court for the Southern District of Florida vacated a nationally-applicable guidance issued by the Corps's Headquarters claiming that once PCC is converted from an agricultural use to a non-agricultural use, it ceases to be excluded from the CWA. In vacating the guidance, the court deemed the guidance to be in direct conflict with the EPA's and Corps's 1993 rule excluding PCC from the CWA because the rule's preamble provided that PCC remains PCC (and thus excluded from CWA requirements) regardless of use. In fact, the position explained by the joint EPA/Corps preamble was in response to a direct comment from the public asking whether a change in use results in the loss of PCC classification. The court concluded the guidance was a nationally applicable legislative rule promulgated without following the Administrative Procedure Act (APA). Unhappy with the court's ruling, the Corps sought to amend the judgment in 2011 in order to apply the guidance on a case-by-case basis. The court, again, instructed the Corps that it was not to make any wetlands determinations inconsistent with its prior order unless it changes the 1993 rule following APA notice and comment rulemaking procedures. The Corps did not appeal the decision. Both the 2010 and 2011 court orders are attached for your review.

Fischer 1. Is EPA adhering to the district court ruling that enjoins the Corps from applying the "change in use" guidance nationwide? If not, please explain why?

Response: I appreciate your question on this important issue. The preamble to the 1993 PCC rule clarifies the circumstances under which agricultural lands could lose their status as PCC consistent with then existing provisions of the Food Security Act (FSA). The FSA rules subsequently changed and I know the U.S. Army Corps of Engineers (Corps) has been working with the U.S. Department of Agriculture (USDA) to reflect those changes in how it implements the agencies' Clean Water Act regulations. The EPA generally does not make jurisdictional determinations, but instead relies on the Corps in its role as the Clean Water Act section 404 permitting authority. The EPA's goal, however, which I know is shared by the Corps and the USDA, is to provide farmers with consistency and predictability in the implementation of agency responsibilities. If confirmed, I look forward to working with our federal partners and the agriculture community to ensure maximum consistency in the application of the PCC rule.

Fischer 2. If EPA is not adhering to the district court ruling, please explain to me what EPA's position is regarding the regulatory status of PCC that is converted to a non-agricultural use? Is EPA's position the same as the position you took at your confirmation hearing? Is it EPA's position that upon changing the use of prior converted cropland from an agricultural

to a non-agricultural use, that land no longer qualifies as prior converted cropland and can be considered a "water of the United States" absent another exemption?

Response: I want to emphasize that, as a general matter, the EPA does not conduct Clean Water Act jurisdictional determinations, including determinations regarding the jurisdictional status of Prior Converted Cropland (PCC). The Corps has this responsibility as a part of its day to day role as the Clean Water Act section 404 permitting authority. The EPA is working with the Corps and the USDA, however, to ensure maximum consistency in the implementation of requirements established under the Clean Water Act and Food Security Act. The agencies promulgated the PCC rule in 1993 to ensure that farmers could rely on determinations made by the USDA regarding the status of their property. If confirmed, I will work with the USDA and the Corps to clarify this issue consistent with the Florida court decision.

Fischer 3. Will you commit to me that, if confirmed, EPA will not take a position that is different from the district court ruling discussed above unless and until EPA and the Corps change the 1993 rule following notice and comment rulemaking?

Response: If confirmed, I will work with the Corps and the USDA to clarify implementation of the PCC regulation in a manner consistent with the District court decision in Florida and under the requirements of the Administrative Procedures Act. The EPA's goal will be to provide farmers with a consistent and predictable determination regarding the status of their lands under the Food Security Act and the Clean Water Act.

Fischer 4. If you will not make such a commitment, please explain to me what authority EPA has to deviate from the position adopted in the 1993 rule.

Response: If confirmed, I look forward to working with our federal partners to clarify implementation of the 1993 Clean Water Act rule in a manner that is consistent with existing provisions of the Food Security Act so that farmers may continue to rely on a single federal voice.

Fischer 5. Does EPA have any plans to adopt further guidance or go through a rulemaking to change the 1993 rule in order to impose a "change in use" limitation on the PCC exemption?

Response: It is my understanding that no decision has been made by the EPA to adopt guidance or revise our regulations to impose a "change in use" limitation. If confirmed, I look forward to keeping you informed about progress on this issue.

Fischer 6. Do agricultural ditches on cropland that is PCC also qualify PCC?

Response: The status of agricultural ditches as "Prior Converted Cropland" is a determination made by the USDA. I defer to USDA to clarify the status of ditches located on PCC.

EPA's National Rivers and Streams Assessment

Thank you for committing to me that, if confirmed, you will ask EPA staff to relook at the way to set the benchmark when conducting the National Rivers and Streams Assessment. You also indicated that the assessment is intended to address the question of "how well are we doing." To understand the approach you will take on this issue if confirmed as the Assistant Administrator, please respond to the following questions:

Fischer 7. I believe the mission of EPA's Office of Water is to implement statutes enacted by Congress, including the Clean Water Act. Do you believe the Office of Water has other missions not authorized by statute?

Response: No. I believe it is the responsibility of the Office of Water to implement the laws passed by Congress, and if confirmed, would ensure that the EPA continues to do so.

Fischer 8. In your view, is it appropriate for EPA's Office of Water to measure "how well we are doing" implementing the Clean Water Act by evaluating the condition of waters against a benchmark of streams that are least disturbed by human activity?

As I stated at my confirmation hearing, I am not intimately familiar with the process used in the National Rivers and Streams Assessment to set a benchmark against which to compare monitoring results. I understand that the primary purpose of the National Rivers and Streams Assessment is to provide general information about the quality of our nation's waters, and not to serve a specific Clean Water Act regulatory purpose. If confirmed, I look forward to learning more about the approach used in the draft assessment to ensure that it represents the highest quality science and is effective at helping to assess the conditions of our nation's waters.

Fischer 9. Do you consider it to be the mission of EPA's Office of Water to return rivers and streams to conditions that existed before human activity?

The EPA's overall mission under the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, as noted in Question 10 below. The agency works to achieve this Congressional statement of policy through the specific programs outlined in the Act.

Fischer 10. The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

Do you believe the Clean Water Act objectives under section 101(a) are a grant of authority to EPA to take actions to further those objectives, or do you believe EPA can implement the Clean Water Act only through specific authorities granted in other sections of the Act?

Response: It is important for all of the EPA's actions to be consistent with the authorities conferred by the Clean Water Act and to support the Act's vital objectives of restoring and maintaining the quality of waters on which all Americans rely. If confirmed, I commit to working with the EPA's Office of General Counsel to ensure the EPA's actions do that.

Fischer 11. Do you agree that successful protection and maintenance of water quality is determined under the Clean Water Act by evaluating whether a water body is achieving water quality standards established by states and approved by EPA, which include a use designation and criteria to protect those uses?

Response: I agree that water quality standards are the foundation of the water quality-based pollution control program established by the Clean Water Act and can form a basis for determining success.

Fischer 12. Has a state designated any water body with the use of "least disturbed by human activity"?

Response: I am unaware of any state use designations under the Clean Water Act that use this specific term. However, states have significant flexibility in how they designate uses for their waters, and some states do establish categories of high quality waters to which little to no degradation is allowed.

Fischer 13. Absent any water quality standards established to protect and maintain a use of "least disturbed," do you believe it is appropriate for the Office of Water to evaluate its success in implementing the Clean Water Act by assessing water bodies based on whether they match the conditions of "least disturbed" waters?

Response: As noted in my response to Question 8, and as I noted at my confirmation hearing, I am not intimately familiar with the process used in the National Rivers and Streams Assessment to set a benchmark against which to compare monitoring results. I understand that the primary purpose of the National Rivers and Streams Assessment is to provide general information about the quality of our nation's waters, and not to serve a specific Clean Water Act regulatory purpose. If confirmed, I look forward to learning more about the approach used in the draft assessment to ensure that it represents the highest quality science and is effective at helping to assess the conditions of our nation's waters.

Fischer 14. If you believe it is appropriate to conduct a National Rivers and Streams Assessment for a purpose other than implementation of the Clean Water Act, please identify your authority to expend federal dollars to conduct this assessment.

Response: It is my understanding that the National Rivers and Streams Assessment, and the EPA's work to develop nationally consistent National Aquatic Resource Surveys, have been conducted in order to achieve the goals of the Clean Water Act, and are authorized under section 104.

Science Advisory Board Panel on Water Connectivity

In March 2013, EPA requested public nominations of scientific experts to form a Science Advisory Board (SAB) panel to review the agency's draft science synthesis report on the connectivity of streams and wetlands to downstream waters.

Fischer 15. What is the status of the nomination process?

Response: I understand that the EPA's Science Advisory Board is currently in the process of reviewing the nominations it has received from the public to serve on the advisory panel that will review the agency's draft science synthesis report.

Fischer 16. Will EPA commit to including individuals nominated by agricultural, industry, and property rights representatives in order to ensure that the agency lives up to its promise of balanced SAB review panel?

Response: I share your goal of ensuring that the agency's scientific products are reviewed by qualified, independent entities. I understand that the EPA's Science Advisory Board has an established process for soliciting nominees for its advisory panels, evaluating potential conflicts of interests, and selecting panelists in a transparent and non-biased way. If confirmed, I commit to ensuring that the Office of Water's scientific products undergo effective, independent peer reviews, and that we recommend to the SAB that it continue to follow its panel selection procedures.

Fischer 17. Specifically, will EPA include the seven individuals Agricultural Retailers Association recommended to Dr. Thomas Armitage on June 7, 2013?

Response: I am not familiar with the current status of the Science Advisory Board's efforts to select members of the peer review panel for the EPA's science synthesis document, which is a process conducted independently of the Office of Water. However, I believe that the Science Advisory Board staff are carefully reviewing the nominations they have received, including the individuals you refer to above.

Immediate Judicial Review of Jurisdictional Determinations

Fischer 18. EPA has recognized those who receive Clean Water Act compliance orders are entitled to immediate pre-enforcement judicial review under Administrative Procedure Act and the Supreme Court's decision in Sackett v. EPA. Given that jurisdictional determinations are similar to compliance orders in that they mark the agency's definitive ruling on Clean Water Act jurisdiction, obligate recipients to go through Clean Water Act permitting for discharges into "navigable waters," and fix the legal relationship between recipients and the EPA, will you recognize if confirmed that a property owner is entitled to immediate judicial review of jurisdictional determinations?

Response: I understand the importance of this question as the agencies work to apply the decision in *Sackett* v. *EPA*. As a general matter, however, EPA does not conduct jurisdictional determinations for landowners seeking Clean Water Act permits. Under Clean Water Act section 404, jurisdictional determinations are done by the Corps. If confirmed, I would be glad to work with you and the Corps to address this key issue.

State Revolving Funds

Fischer 19. I have been advised that if the annual Congressional capital grants to the Clean Water and Drinking Water State Revolving Funds (SRFs) are reduced to zero, the collective corpuses of the SRFs will diminish by 30% in 10 years. What is EPA's and the Administration's long-term plan and proposal for maintaining SRF capital grants to states on an annual basis, consistent with the policy of Section 101(a)(4) of Clean Water Act, to provide assistance to local governments with the huge costs to comply with federal combined sewer overflows and wastewater facility requirements?

Response: I appreciate your concern regarding our communities' ability to make drinking water and wastewater infrastructure investments in this time of diminishing state and federal resources. The Clean Water and Drinking Water State Revolving Funds are critical tools for helping achieve our nation's clean water goals, and I support continued investment by the Congress in these funds in future years. At the same time, if confirmed, I will support innovative EPA efforts to help achieve more efficient clean water results while reducing burdens on communities, such as by promoting integrated municipal wastewater and stormwater planning, and encouraging more efficient and cost effective green infrastructure approaches to addressing our wastewater and stormwater infrastructure needs.

Water Quality Standards Rulemaking

Fischer 20. It is understood that EPA has requested permission from the Office of Management and Budget to amend the agency's Water Quality Standard Regulations set forth in 40 CFR Part 131. What are the topics of that proposed regulation?

Response: The EPA is working on updating its water quality standards regulations, which have not been updated since 1983. Although the agency has not yet published a proposed rule, as noted in the agency's Regulatory Development and Retrospective Review Tracker, a number of issues have been raised by stakeholders or identified by the EPA in the implementation process that will benefit from clarification and greater specificity. The proposed rule addresses the following six key areas:

1) Administrator's determination that new or revised WQS are necessary;
2) designated uses;
3) triennial review requirements;
4) antidegradation;
5) variances to water quality standards; and
6) compliance schedule authorizing provisions.

Effluent Limits for Storm Water Permits

Fischer 21. Is EPA planning to propose regulation of municipal separate storm sewer flow amounts and numeric effluent limits for pollutants? If so, what is EPA's statutory authority to consider regulating such flows and numeric effluent limits for pollutants?

Response: The EPA is considering revisions to its stormwater rules that may include performance standards for stormwater discharges that could require sites to incorporate sustainable stormwater controls as the sites are developed and redeveloped – the time when it is

most cost effective to do so. These standards, if proposed and adopted, could require that stormwater from small storms be retained on or near a site, which would greatly reduce the amount of pollutants entering the nation's waterbodies. Further, I understand that EPA is considering ways to make the program flexible and recognize the many different approaches for addressing stormwater discharges. The legal authority for any such proposed rule is section 402(p)(6) of the Clean Water Act, 33. U.S.C. § 1342(p)(6), which provides that:

> *[T]he Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5) which designates stormwater discharges, other than those described in paragraph 2 [discharges already regulated] to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (b) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements as appropriate.*

Consent Decrees

Fischer 22. Section 402 of the Clean Water Act authorizes and directs the issuance of NPDES permits for discharges to the nation's waters. Such permits act as shields against EPA and state enforcement and citizen lawsuits so long as the permittee remains in compliance with its permit. In light of this, what is EPA's authority for requiring civil consent decrees in lieu of, or in addition to, NPDES permits for publicly treatment facilities, combined sewer overflows, and municipal separate storm sewer systems? Further, what is the authority for EPA insisting on civil consent decrees to implement green infrastructure by local governments?

Response: While Clean Water Act enforcement is not part of the Office of Water's responsibilities, there is close coordination between the EPA's Offices of Water and Enforcement and Compliance Assurance and I look forward to the opportunity to continue to strengthen that partnership. The EPA has recently embarked upon an integrated planning initiative to recognize the challenges faced by municipalities. This voluntary approach allows municipalities to sequence wastewater and stormwater projects in a way that allows the highest priority environmental projects to come first in a manner that is within the financial capability of the municipality. If confirmed, I look forward to encouraging such efforts in order to meet water quality objectives and provide the most beneficial, cost effective solutions for our communities.

Spill Prevention, Control, and Countermeasure (SPCC) Plans

EPA officials have said farmers and ranchers need to determine if fuel storage on their farm and ranchers "would reasonably be expected" to discharge oil into waters of the United States. If so, they are then subject to the rule. But when questioned, EPA officials have refused to further define the term "reasonably be expected" and only say farmers and ranchers should consider a worst case scenario.

Fischer 23. Could you help my constituents by better defining when a "reasonable expectation" exists?

Fischer 24. If a farmer determines a reasonable expectation for a spill to reach waters does not exist, what criteria will EPA use to evaluate whether it agrees with a farmer's determination?

Fischer 25. What certainty do farmers and ranchers have that their determinations will be agreed to by EPA if inspected? (Nebraska Farm Bureau has heard from a member near Valentine who is 300 yards from the nearest ditch and miles away from the nearest stream; should that farmer "reasonably expect" a spill to enter a water of the U.S.?)

Fischer 26. Does agriculture have a history of large oil or fuel spills?

Fischer 26a. If not, why did EPA seek to include farms and ranches in the SPCC regulation?

Fischer 26b. Can EPA justify the possibly significant compliance cost to farmers and ranchers given the lack of history of spills?

Fischer 27. Because of the SPCC regulation, Ihave heard farmers and ranchers are now buying smaller fuel tanks to avoid the high cost of compliance. The smaller tanks mean fuel delivery personnel would likely need to deliver fuel more often (at a higher cost to the farmer) to meet the needs of their customers. Would you agree that large fuel trucks making more trips and spending more time on the road not only increases the potential for a spill from those trucks, but also increases the environmental impacts because of the increase in time spent on the road?

Response to Fischer 23-27: The Spill Prevention, Control, and Countermeasure (SPCC) rule is managed through the Office of Solid Waste and Emergency Response, and is not within the purview of the EPA's Office of Water. Therefore, I am not in a position to provide detail on these specific questions. However, it is my understanding that the EPA has provided guidance for the agricultural sector regarding this rule, and seeks input from the agricultural community if any provisions of this rule remain unclear. If confirmed, I would look forward to working with the Office of Solid Waste and Emergency Response and with farmers and ranchers to ensure that the agency's clean water programs are well coordinated on these lands.

Duplicative Pesticide Permits

Fischer 28. I would like to address the duplicative permitting requirement for pesticide applications. As you know, Clean Water Act permits are now required for certain pesticide applications that are already safely governed under the Federal Insecticide, Fungicide, and Rodenticide Act. I understand EPA has provided technical assistance to Congress on legislation to address this issue, and I hope the agency will continue to work cooperatively with Congress on this matter. If you are confirmed, will you support efforts to reduce the duplicative permitting requirement for pesticides?

Response: If confirmed, I will work closely with the EPA's Office of Chemical Safety and Pollution Prevention to ensure that pesticide related work under the Clean Water Act by the Water Office is effectively coordinated with the agency's work under the Federal Insecticide, Fungicide, and Rodenticide Act.

CAFO Clean Water Act Permits for "Dust and Feathers"

It is my understanding EPA has been issuing enforcement orders compelling livestock and poultry farmers to seek a federal Clean Water Act permit for small, incidental amounts of dust, feed, feathers, and manure on the farmyard that could be washed away by rainwater, even if the farm is located a long way from any stream.

I want to be clear; I am not referring to manure piles or the production area where feed and animals are kept or manure storage facilities. The regulatory action in question relates to incidental amounts of feathers and dust blown from ventilation fans, or very small amounts of manure that can be tracked on a boot or tire and are commonly found on all farms.

Fischer 29. Do farmers have to worry about controlling rainwater that falls on their barnyards that may carry very small amounts of pollutants into waters?

Fischer 30. Do small amounts of dust, feathers, and manure found on any livestock farmyard require a federal permit when washed by rain into a stream?

Fischer 31. Why isn't that just ordinary agricultural stormwater that is common to all farms and specifically exempted from regulation by the Clean Water Act?

Response to Fischer 29-31. Your question asks about specific enforcement actions that the agency has taken with which I am not familiar. If confirmed as Assistant Administrator for Water, I can assure you that I would support efforts to provide maximum clarity for our nation's agricultural community regarding circumstances in which Clean Water Act permits are and are not required. Some agricultural operations, such as Concentrated Animal Feeding Operations (CAFOs), are required to obtain permits if they discharge pollutants to waters of the United States. I am also aware of recent court decisions that have addressed these specific issues. If confirmed, I would commit to working closely with the EPA's Office of Enforcement and Compliance Assurance, with the U.S. Department of Agriculture, with the agricultural community, and with Congress, to help reduce uncertainty for our nation's agricultural community regarding Clean Water Act permitting.

Fischer 32. Do farmers need to fear that, as Assistant Administrator, you intend to require federally mandated permits to regulate farm dust?

Response: Point sources, including Concentrated Animal Feeding Operations, need to obtain Clean Water Act permits only if they discharge pollutants into waters of the United States.

Senator BOXER. Thank you so much, Mr. Kopocis.
Mr. Jones.

STATEMENT OF JAMES JONES, NOMINATED TO BE ASSISTANT ADMINISTRATOR FOR THE OFFICE OF CHEMICAL SAFETY AND POLLUTION PREVENTION, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. JONES. Good morning Chairman Boxer, Ranking Member Vitter, and other members of the committee.

I am greatly honored to appear before you today as President Obama's nominee for Assistant Administrator of the Office of Chemical Safety and Pollution Prevention at EPA.

With me today are my wife, Amalia, and our daughter Lena. Our son Marcellus is away at soccer camp, so he is unable to be with us here today, but I am sure his sister will fill him in on all the excitement.

For 26 years, I have served as a career employee of EPA. The majority of this time has been spent in furthering chemical safety. Over 17 years ago, I was engaged in the development of the Food Quality Protection Act. This law, which passed with bipartisan support, required EPA to evaluate all food use pesticides against a risk based standard within 10 years. Although few thought the Agency would be able to meet such an ambitious schedule, we did just that. Although some pesticides were completely eliminated from use in the U.S., for many others, EPA, working with stakeholders, was able to find common sense, cost-effective ways to reduce exposure and meet the rigorous safety standard. I am proud to have played a role, along with many other dedicated and talented EPA staff, in ensuring food safety in the United States. Some of the most salient lessons I learned in this experience were the importance of sound science as the underpinning of our decisions and the power of transparency in our processes.

More recently, my efforts in furthering chemical safety have focused on the implementation of the Toxic Substances Control Act, or TSCA. At the beginning of the Obama administration, I was an active participant in the development of the Administration's principles for TSCA reform. It has been very encouraging to see similar principles articulated by industry and public interest stakeholders. I look forward to working with this committee on modernizing TSCA to ensure the safety of chemicals in consumer and commercial products.

As important as TSCA reform is to a robust chemical safety program in the U.S., I believe it is important for EPA to use the existing tools it has to ensure chemical safety. We are assessing the risk for those chemicals which we know present hazards and to which we know people are exposed. We have developed a workplan for these chemicals and have published the first five draft risk assessments. More risk assessments are coming. We are also increasing the availability and the accessibility of information so that manufacturers, their customers, and the public can make informed choices about chemicals and products. Last year we published the first ever Safer Chemicals Ingredients List, which now has over 600 chemicals, and we are adding to this list. In the coming weeks,

we will launch a website that will allow industry and the public easier access to health, safety and other data on TSCA chemicals.

I also believe that preventing pollution in the first place is a preferable approach to achieving chemical safety. Over the years, I have promoted and participated in programs that work with industry and the public to make environmentally preferable choices. These programs have payoffs that far exceed the minimal resources used to initiate them.

I am proud to have had a role in furthering chemical safety of this Nation. Ensuring chemical safety, maintaining public confidence that EPA is protecting the American people and our environment, and promoting our global leadership in chemicals management remain top priorities for me. If confirmed, I look forward to working with this committee, especially in the area of TSCA reform.

Thank you, and I appreciate your questions.

[The prepared statement of Mr. Jones follows:]

STATEMENT OF JIM JONES

NOMINEE FOR ASSISTANT ADMINISTRATOR FOR THE

OFFICE OF CHEMICAL SAFETY AND POLLUTION PREVENTION

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE

SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

JULY 23, 2013

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For 26 years, I have served as a career employee of EPA. The majority of this time has been spent in furthering chemical safety. Over 17 years ago, I was engaged in the development of the Food Quality Protection Act. This law, which passed with bipartisan support, required EPA to evaluate all food use pesticides against a risk based standard within 10 years. Although few thought the Agency would be able to meet such an ambitious schedule, we did just that. Although some pesticides were completely eliminated from use in the US, for many others, EPA, working with stakeholders, was able to find common sense, cost-effective ways to reduce exposure and meet the rigorous safety standard. I am proud to have played a role along with many other dedicated and talented EPA staff, in ensuring food safety in the United States. Some of the most important lessons I learned in this experience were the importance of sound science as the underpinning of our decisions and the power of transparency in our processes.

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Thank you. I welcome your questions.

Questions for the Record
July 23, 2013 Hearing on the
Nomination of James Jones to be Assistant Administrator for the Office of Chemical Safety and Pollution Prevention of the U.S. Environmental Protection Agency
Committee on Environment and Public Works
United State Senate

Senator Boxer

Boxer 1. Mr. Jones, can you please describe your views on the importance of the EPA using every available tool in its tool box to protect public health from dangerous chemicals?

Response: The EPA strongly supports legislative reform of the Toxic Substances Control Act (TSCA), which is badly outdated and does not provide the EPA with the tools it needs to adequately protect the American public and the environment from the risks from chemicals. The TSCA is the only major environmental statue that has not been updated. TSCA does not have a mandatory program or deadlines for the EPA to conduct a review to determine the safety of existing chemicals. In addition, the TSCA places procedural hurdles on the EPA before the agency can request the generation and submission of health and environmental effects data on existing chemicals. The TSCA also makes it difficult to take action to limit or ban chemicals found to cause unreasonable risks to human health or the environment, given the requirement that the EPA choose the least burdensome approach to address unreasonable risks.

While we work with this committee and others on reform efforts, we are also strongly committed to utilizing the current statute to the fullest extent possible to ensure chemical safety. For example, in early 2012, the EPA released a Work Plan of 83 chemicals for risk assessment over the coming years. If an assessment on a Work Plan chemical indicates a potential risk, the EPA will evaluate and pursue appropriate risk reduction actions, as warranted. If an assessment indicates negligible risk, the EPA will conclude its work on the uses of the chemicals being assessed. Nevertheless, without the TSCA reform, these chemical assessments will take significantly longer and actions to address potential concerns will be substantially more difficult due to the limitations in the current statute.

Boxer 2. Mr. Jones, the Assistant Administrator of the Office of Chemical Safety and Pollution Prevention plays a key role in enforcing strong ethical and scientific protections that safeguard people from dangerous tests involving pesticides.

If confirmed, do you commit to make the enforcement of these protections a priority and to have a zero-tolerance approach to any violations of these important safeguards?

Response: Yes.

Boxer 3. Mr. Jones, do you believe that the administration's TSCA reform principles should be considered in TSCA reform legislation?

Response: Yes

Senator Carper

Carper 1. Mr. Jones, you've said that the public has the right to expect that the chemicals found in products that they use are safe and provide benefits without hidden harm. As you know, this Committee is currently considering various proposals for reforming toxics legislation. I am very hopeful that we can move forward with a package of reforms, and while I have some concerns about it, I believe that the compromise legislation drafted by Senator Lautenberg and Ranking Member Vitter is a good place to start. That being said, as with much of what we are tasked with in this Committee, passing a bipartisan reform bill will be difficult. In the absence of TSCA reform, what are the prospects for EPA's effective assessment of chemicals in the marketplace, and effective regulation of any chemicals that are found to have negative impacts on human health or the environment?

Response: The EPA strongly supports legislative reform of the TSCA, which is badly outdated and does not provide the EPA with the tools it needs to adequately protect the American public and the environment from the risks from chemicals. The TSCA is the only major environmental statue that has not been updated. The TSCA does not have a mandatory program or deadlines for the EPA to conduct a review to determine the safety of existing chemicals. In addition, the TSCA places high legal and procedural hurdles on the EPA before the agency can request the generation and submission of health and environmental effects data on existing chemicals. The TSCA also makes it difficult to take action to limit or ban chemicals found to cause unreasonable risks to human health or the environment, given the requirement that the EPA choose the least burdensome approach to address the unreasonable risk.

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Carper 2. In the past, it's been EPA's position that for any TSCA reform effort to be effective, EPA must have the tools to quickly and efficiently obtain information from manufacturers that is relevant to determining the safety of chemicals. I agree that good and complete information must be central to any reform effort. But I also know that some companies are wary of minimum requirements for data, which could compromise proprietary business information. Could you talk a little bit about how you'd recommend striking a balance between the need for information with this sensitivity of chemical products manufacturers?

Response: The EPA takes very seriously our commitment to ensuring the confidentiality of a company's proprietary chemical information under our current statutory authority and would certainly have the same commitment to carry out the protections contained in reformed chemicals management legislation. The administration's "Essential Principles for Reform of Chemicals Management Legislation" identify the need for the EPA to have the information

necessary to conclude whether chemicals are safe for the public and the environment. We are committed to protecting legitimate claims of proprietary business information while providing the agency with the information it needs to make safety determinations and are confident that we can continue to strike that balance.

Carper 3. Like many federal agencies, EPA has taken a fairly big budget hit in recent years. If TSCA reforms are successful, I am concerned about EPA's ability to implement them considering a limited budget. Similarly, I am concerned about resources being shifted from other programs, such as the clean air programs that arc so important to ensuring the air we breathe is healthy. Could you comment on this challenge, and how you'd work to address it?

Response: Despite a challenging budget climate, the EPA plans to sustain its chemical safety program at a level that will enable essential work to proceed to review new chemicals before introduction into the marketplace and on our efforts to evaluate and manage potential risks of chemicals already in commerce. This work, however, may have to proceed more slowly if resources are further reduced. The EPA has no plans to shift resources from other programs, such as clean air or water.

Senator Vitter

Topic: Confidential Business Information (CBI)

Vitter 1. EPA recently sent to OMB a Notice of Proposed Rulemaking to amend the PMN regulations to prohibit companies from protecting chemical identity in health and safety studies, unless to do so would reveal process or concentration information. If implemented, any company that invested hundreds of thousands of dollars, or perhaps millions, on research and development to create new and innovative chemistries that don't fall within these two exceptions that EPA would recognize (e.g. surfactants; reactive products) would have to reveal those confidential chemical identities.

Can you comment on the potential for this policy to have an adverse impact on innovation and the economy?

Response: We are currently working to better understand the impact of such a rule change on innovation and the economy as well as the incentive structure for development of health and safety studies for premanufacture notice (PMN) chemicals before we move forward.

Vitter 2. Mr. Jones, if I read EPA's interpretation of Section 14(b) correctly, the Agency believes that it does not have the authority to protect confidential chemical identities except when that information would reveal process information or concentration in a mixture.

Is this correct?

Response: Section 14(b) applies only to confidentiality claims made in the context of health and safety studies. The EPA has not adopted an interpretation in this regard. In the PMN context, the EPA is working to better understand the impact of such a rule change on innovation and the economy as well as the incentive structure for development of health and safety studies for PMN chemicals before we move forward.

Vitter 3. If EPA's interpretation is correct, that would suggest that the Agency was acting beyond its authority for more than 30 years. Alternatively, if EPA's new interpretation of Section 14 is not correct, the Agency is about to embark on actions that it is not authorized to do under the statute.

Has the Office of General Counsel at EPA analyzed these questions about EPA's authority? What has OGC concluded?

Response: The EPA's Office of General Counsel has been and will remain closely engaged as the EPA works through the intergovernmental process on this issue.

Vitter 4. Mr. Jones, while I am generally supportive of EPA's goals for providing the public better access to information about chemicals, I am very concerned about certain aspects of the Agency's current stance on CBI. In 20 I 0 EPA announced a policy shift in its interpretation of Section 14(b) of the Toxic Substances Control Act (TSCA) and plans to deny claims for confidential chemical identity in health and safety studies except where disclosing that identity would also disclose process information or concentrations in a mixture or formulation. This

narrow interpretation of the statute's protection of CBI is a direct contradiction of more than 30 years of EPA's own legal and policy position as well as legislative history. It is also inconsistent with 5 other federal environmental statutes enacted between 1972 and 1986, all of which provide for disclosure of health and safety effects information while still protecting confidential chemical identities. In fact, even EPCRA, the Right-to-Know statute allows confidential chemical identity to be protected in a health and safety study.

Can you please comment on EPA's more recent interpretation of TSCA 's CBI provisions and why the Agency now thinks TSCA should treat confidential chemical identity differently than it's treated under the other five federal environmental statutes?

Response: As indicated in the response to the first question on this issue (see Vitter 1), we are currently working to better understand the impact of such a rule change on innovation and the economy as well as the incentive structure for development of health and safety studies for PMN chemicals before we move forward.

Topic: Endocrine Disrupter Screening Program (EDSP)

Vitter 5. As you know, the extensive suite of EDSP Tier I screens is very costly {up to $1 million per chemical) and several of them have come under significant criticism from a technical perspective. Computational toxicology methods and high throughput screens hold great promise for increasing efficiency and reducing the use of animal testing in the EDSP.

How will the Agency ascertain confidence in the use of ToxCast prediction models and the results they generate for decision making in the EDSP, including use for prioritization?

Response: Computational toxicology and high throughput methods defining endocrine activity are being developed by the EPA to improve the efficiency and reduce animal testing in the EDSP Tier 1 battery of assays. In January 2013, the EPA asked the Scientific Advisory Panel (SAP) to review and comment on using these computational and high throughput approaches for prioritizing chemicals for the EDSP. The SAP endorsed the EPA's approach and encouraged continued use of ToxCast and other predictive models for prioritization. As we continue to incorporate the best available science into the EDSP, our confidence in all relevant data and models will be regularly assessed in open and transparent forums such as SAP peer review.

Vitter 6. When the EDSP was first being developed, a joint committee of EPA's Science Advisory Panel (SAP) and SAB recommended that after the initial round of EDSP screening, the Agency should analyze the results and conduct an independent scientific review, with an eye towards revising the process and eliminating those EDSP screening methods that may be found to be flawed. The SAP is now reviewing and analyzing the results and experiences gained from this first round of EDSP testing, to learn which assays are working well and which are not and to leverage this information to support the development of an improved EDSP, before requiring testing of additional chemicals.

Will EPA review the SAP analysis before requiring testing of additional List 2 chemicals?

Response: Yes.

Topic: EPA's Design for the Environment (DfE) Safer Product Labeling Program

Vitter 7. Congress gave EPA authority under the TSCA to require labeling or otherwise restrict the use of chemicals if EPA determines that the use of the chemical presents or will present an unreasonable risk of injury to health or the environment. This means evaluating public exposure and doing a traditional risk assessment that is made available for public comment.

Given that the DfE program is not evaluating likely public exposure and risk, is EPA trying to end run a congressionally mandated program through this labeling program?

Response: No. The EPA's DfE program exercises authority from three statutes: the Pollution Prevention Act (PPA), the Toxic Substances Control Act (TSCA), and the National Environmental Policy Act (NEPA), as detailed below. Section 6604(b)(5) of the PPA, 42 USC 13103(b)(5), authorizes the EPA to "facilitate the adoption of source reduction techniques by businesses." The term "source reduction" is defined at section 6603(5) of the PPA, 42 USC 13102(5) and, in short, can involve changes in design, manufacture, purchasing, or use of materials to reduce the amount hazardous substances that are released to the environment. By contributing information that can be used to identify safer alternative chemicals, DfE helps businesses consider options that may ultimately achieve source reduction.

Section 10 of the TSCA, 15 USC 2609, authorizes the EPA to conduct research, development and monitoring to carry out the purposes of the TSCA, including to effectively regulate chemical substances and mixtures to prevent unreasonable risk of injury to health or the environment. Such research can lead to commercial innovations in the production of chemical substances and mixtures to reduce the risk of injury to health and the environment. By providing a framework for researching the human and environmental health characteristics of alternative chemicals, DfE helps identify innovations in safer chemistry that can reduce risk.

In addition, the EPA has authority under section 102(2)(G) of the NEPA, 42 USC 4332(2)(G), to provide advice and information available to units of government, institutions and individuals that may be used to restore, maintain and enhance the quality of the environment. DfE provides information on potential chemical hazards that decision makers can use in selecting chemicals that are safer for human and environmental health.

Vitter 8. Currently, EPA does not allow products with the DfE logo to use packaging that contains bisphenol A, or BPA. This conclusion is at odds with the FDA, which considers exposure and risk. According to the FDA, BPA is safe in food contact materials.

Vitter 8a. Why doesn't EPA defer to FDA on this point since FDA has actually looked at public exposure and risk while EPA has not?

Response: DfE is a voluntary recognition program designed to allow partners to differentiate products made with chemicals that are "best in class" for their functional use as it relates to their hazard to human health and the environment.

Vitter 8b. How is the public supposed to rectify this inconsistency?

Response: We believe the public understands the concept of best in class.

Vitter 9. Do you have any idea of the benefits or costs of this program?

Vitter 10. Isn't this another reason why you should not be proceeding with this program?

Response to 9 and 10: From the point of view of economic analysis, businesses will voluntarily participate in a program if it offers them (economic) benefit. The fact that more than 500 U.S. businesses participating in the DfE program, some for a period of many years, speaks to the program's usefulness and economic advantage.

Vitter 11. Does EPA look at the likelihood of actual public exposure in determining which products are "safer" under this program?

Vitter 12. If EPA does not look at the likelihood of actual public exposures, then how does EPA determine which products actually pose lower or higher risks?

Response to 11 and 12: The Safer Product Labeling Program requires the use of the lowest hazard chemicals for each functional use ("best in class"). Because exposure is held essentially constant, a reduction in hazard results in a reduction in risk.

Vitter 13. Couldn't this labeling program be more hurtful then helpful?

Response. That seems very unlikely, as we are confident that labeled products are of lower risk for their intended use.

Vitter 14. Isn't it possible that another product on the shelf could actually pose a lower risk – that is, be Safer – than the product with the DfE label?

Response. Because the Safer Products Labeling Program is voluntary, it is theoretically possible that a product that does not bear the DfE logo could have an equivalent or better safety profile to a DfE labeled product. The presence of the DfE logo on a product offers an assurance to consumers that a product has been carefully and objectively reviewed by scientific experts and determined to be safer for human and environmental health.

Vitter 15. Aren't you then misleading consumers?

Response. No. The EPA confirms that a product bearing the DfE logo has low concern for individuals, families, and the environment.

Vitter 16. The regulatory process has built-in protections to prevent arbitrary and capricious action by agencies.

Vitter 16a. Why should American consumers have the content of their products determined by a judgment of EPA made outside of the regulatory process?

Response: The EPA is not regulating these products or determining their content. Rather, the agency evaluates whether the products formulated and submitted voluntarily by U.S. businesses meet transparent criteria for chemical safety, and differentiates those that are best in class.

Vitter 16b. Why does EPA seek to operate outside of that framework?

Response: The EPA is continually looking for nonregulatory collaborative means to achieve our goals of protecting human health and the environment. The DfE Safer Product Labeling Program is an example of collaboration between industry, the EPA, and other stakeholders to send appropriate market signals as incentives for development and use of safer chemicals.

Vitter 16c. Will you commit to a rulemaking process to establish the standards and procedures for the alternatives assessment?

Response: The EPA has been very transparent and has encouraged public participation in development of the standards for the Safer Product Labeling Program and for methodology for alternatives assessments.

Vitter 17. Under the DfE Safer Product Labeling Program, EPA evaluates products and grants the manufacturer the right to put a DfE Safer Chemistry label on the product if it meets the DfE criteria.

Vitter 17a. What is EPA's authority for this labeling program?

Vitter 17b. Did Congress ever specifically authorize EPA to conduct this labeling program that would deem some products to be safer than others? [The Pollution Prevention Act authorizes EPA to provide information and technical assistance to businesses, but does not include authority for a safe product-labeling program.]

Response to 17 a-b: Please see the response to Vitter 7.

Vitter 18. Under the Organic Food Production Act of 1990, Congress explicitly granted the USDA authority to establish a "USDA Organic" label. Similarly, under the Energy Independence and Security Act of 2007 Congress explicitly granted EPA and DOE the authority to conduct the "Energy Star" labeling program for appliances.

Vitter 18a. Why did EPA believe it could proceed without Congressional authority to establish this labeling program given its potential to affect markets?

Vitter 18b. Don't you think we would have explicitly authorized a consumer product-labeling program if we intended EPA to have this authority?

Response to 18 a-b: The Congress has repeatedly encouraged the EPA to use nonregulatory means and to more closely work with industry. Please also see the response to Vitter 7.

Vitter 19. Why wasn't the DfE Safer Program Labeling Program and standards developed in accordance with the Administrative Procedures Act rulemaking requirements?

Vitter 20. The APA defines a "rule" to include "an agency statement of general or particular applicability" that "implement, interpret or prescribe law or policy."

Vitter 20a. Don't you believe that the establishment of criteria that says one product is safer than another constitutes a "rule" under that definition?

Vitter 20b. Why did EPA not place any notices in the Federal Register to alert the public as required by the APA?

Vitter 20c. Why did EPA simply assume everyone would know to look for a DfE website?

Vitter 20d. Do you think this upholds the Administration's commitment to transparency and open government?

Vitter 20e. Will you commit to full transparency for the DfE program?

Responses to 19 and 20 a-e: The DfE Safer Labeling Program is a voluntary program that does not impose any enforceable requirements on the regulated community. Companies are not required to participate in the DfE Safer Labeling Program and the program standards are not judicially enforceable legislative rules. As such, the DfE program standards are exempt from the notice and comment requirements of the Administrative Procedure Act (APA). However, many DfE notices have been published in the Federal Register or made public on the Agency's website. Finally, I commit to full transparency in the program and am open to suggestions from any stakeholders as to how we can make the program more transparent.

Topic: Formaldehyde

Vitter 21. In 2010, Congress unanimously passed the "Formaldehyde Standards for Composite Wood Products Act" directing EPA to develop a formaldehyde standard that implements, on a national level, the world's most stringent standard developed by the California Air Resources Board (CARB). In a proposed rule-making conducted pursuant to the Act, the Agency has expanded the definition of laminated products to include fabricators as manufacturers of hardwood plywood composite wood products. This proposed expansion of the definition of laminated products deviates dramatically from the California standard and would create a significant burden for a number of domestic industries by requiring duplicative testing of the same product previously tested by the original manufacturer while providing no additional environmental or health benefit. This deviation from the California rule is not only duplicative and overly burdensome, but in my opinion the definitional expansion is contrary to the intent of Congress in passing the Act.

Can you commit to work with me to ensure that this proposal is modified to conform to the intent of Congress and what EPA ultimately implements is the California standard?

Response: The bill passed by Congress authorized the EPA to exempt laminated products if we could make a finding that the agency could ensure compliance with the emission standards. After consideration of all available and relevant information, the EPA determined that it did not have a sufficient basis to propose categorically exempting all laminated products and ensure

compliance with the emission standards. However, we will consider additional information on this issue as we develop the final rule.

The EPA did, however, propose to exempt laminated products made with certified cores and no-added formaldehyde resins because the EPA has determined that it is very unlikely that these products would exceed the formaldehyde emission standards for the core. If confirmed, I welcome the opportunity to work with you to ensure that the final rule complies with the Act.

Vitter 22. In the Formaldehyde Emissions Standards for Composite Wood Products rule, proposed on June I 0, EPA notes (in its fact sheet) that it "anticipates that the proposed rules will encourage the ongoing trend by industry towards switching to no-added formaldehyde resins in products." While we recognize that Congress provided limited discretionary authority in the Formaldehyde Standards for Composite Wood Products Act, your statement highlights a serious concern that EPA is reaching beyond its authority to distort the marketplace by pushing de-selection of certain chemistries or technologies in the proposed rule. Congress mandated this regulation, including a set of emissions standards that clearly set forth a performance-based approach for regulating formaldehyde emissions from composite wood products, irrelevant to the type of chemistry or technology used.

Vitter 22a. Why is it appropriate for EPA, under its TSCA authority, to be giving preferential regulatory treatment to a particular chemistry?

Response: In the Formaldehyde Standards for Composite Wood Products Act (FSCWPA) of 2010, the Congress provided for preferential treatment for no-added formaldehyde (NAF) resins. The EPA was simply pointing out in its fact sheet what appears to be a market trend that would likely be sped up by this statute.

Vitter 22b. If Congress were to reform TSCA, why should we not expect a program that reflects this propensity for picking winners and losers?

Response: As noted in the previous response, the EPA's intent is to implement the Congress's approach in the FSCWPA. This appears to be entirely consistent with an apparent market trend towards NAF and ULEF resins and consistent with the Congress's practice to encourage and require through statute that the EPA identify and provide incentives for pollution prevention technologies.

Vitter 23. The EPA's proposed Formaldehyde Emissions Standards for Composite Wood Products rule references throughout its Preamble and in supporting documentation the most recent draft EPA formaldehyde IRIS assessment when opining on potential health impacts.

Given the fact that the NAS reviewed and provided a significant critique on the EPA's draft IRIS assessment, would you agree that it is not appropriate to refer to that draft given the major methodological and evidenced-based limitations the NAS identified in the draft assessment and the roadmap it outlined for significant improvements?

Response: The EPA referred to the draft Integrated Risk Information System (IRIS) assessment in order to explain that it was neither the basis for setting the emission standards, nor for calculating the benefits of the proposed rule.

Topic: Lead Bullets

Vitter 24. In 2010, EPA denied a petition by environmental groups to regulate lead in ammunition and fishing tackle under TSCA. I strongly agreed with EPA's denials of that petition and have been alarmed to see renewed discussion of this effort by certain folks within the environmental community.

Vitter 24a. [There is no 24a question]

Vitter 24b. It seems clear to me that EPA does not have the authority to regulate ammunition under TSCA, would you agree with that?

Response: Yes.

Vitter 24c. Can you give me an update on whether you have seen any compelling information that would change the Agency's opinion on the need to regulate lead in fishing tackle?

Response: The EPA does not see a compelling reason to change our view on the need to regulate lead in fishing tackle.

Vitter 25. Mr. Jones, a number of US states have initiated regulatory activities directed at specific chemical substances, or intended to allow the state to identify chemicals of concern or "high priority" chemicals.

Vitter 25a. Do you see a benefit to EPA from your staff being able to share with such states confidential business information that EPA has received from industry submitters with respect to chemical substances, including those chemicals that might be under consideration by regulatory authorities in those, or other states?

Response: States and the federal government together manage chemical risk and public health in the United States. Yet under the TSCA, the EPA does not have the authority to routinely share data claimed as confidential business information (CBI) with our partners, the states. The Administration's Principles for TSCA Reform include the need to share CBI with the states.

Vitter 25b. Would sharing confidential business information with the states require amendments to TSCA?

Response: Yes.

Vitter 25c. If TSCA were amended in that respect, how would the Agency assure the submitters of CBI that their trade secrets can be practically safeguarded by the states against problems our nation is experiencing with safeguarding trade secrets and cyber security?

Response: The EPA takes very seriously our commitment to ensuring the confidentiality of a company's proprietary chemical information under our current statutory authority and would certainly have the same commitment to carry out the protections contained in reformed chemicals management legislation. The administration's "Essential Principles for Reform of

Chemicals Management Legislation" indicate that the EPA should be able to negotiate with other governments on appropriate sharing of CBI with the necessary protections.

Topic: Phthalates Alternatives Assessment

Vitter 26. I understand that the DfE program is currently conducting an assessment of phthalates and that your website states "The goal is for the resulting information to help inform the process of substituting safer alternatives, with reduced health and environmental concerns, for these phthalate chemicals." This would appear to indicate that EPA has already made a judgment that phthalates pose a significant risk that is higher than the likely alternatives.

Vitter 27. Is this true?

Response to 26 and 27: No

Vitter 28. Has EPA evaluated the risk from likely alternatives?

Response: Under DfE's Alternatives Assessment program, the EPA evaluates the hazard of the alternatives, not risk.

Vitter 29. If not, isn't the Agency being arbitrary and capricious and possibly reckless in this labeling program?

Response: This alternatives assessment is not part of the DfE Safer Product Labeling Program and does not involve labeling. Rather, it is part of the DfE alternatives assessment multistakeholder effort to identify and compare potential alternatives based on their hazard profiles and other characteristics. This information can be combined with other product specific information, which might include cost, availability, exposure and risk, to inform decision making.

Vitter 30. Will you commit that the phthalates alternatives assessment will be a fair and objective assessment of the risks of the alternatives.

Response: As noted above, the DfE alternatives assessment evaluate hazard, not risk. EPA commits that the alternatives assessment will be a fair, objective, and transparent assessment of the hazards of the alternatives.

Topic: TSCA Work Plan Chemical Assessments

Vitter 31. EPA has started the peer review of the first TSCA Workplan Assessment, Trichloroethylene (TCE). Thus far the review has not provided any opportunities for true public engagement and dialogue with the peer review panel. In fact it is unclear whether the peer reviewers have any obligation to consider public input at all. When asked direct questions about this, and other substantive comments, the peer review chair ignores questions from the public.

Can you explain why the Agency and its peer reviewers have been so vague in their communications with the public regarding not only the public opportunities to engage in peer review but also regarding the substance of the assessments?

Response: The EPA is fully committed to an open and transparent peer review process on the TCE draft risk assessment and has scheduled three public meetings with the peer reviewers to facilitate this engagement. The EPA also actively sought written public comment on the draft TCE risk assessment and the charge to the panel through a Federal Register Notice. Based on the comments received, we subsequently revised the charge to be responsive to the commenters. All the public comments have been, and will continue to be, provided for consideration by the panel. The transparent and open public meeting aspect of the TCE peer review meetings provides opportunities for observers to listen to the panel deliberations and for the public to provide comments at each meeting.

Vitter 32. In addition, EPA has not answered direct questions regarding whether or not these assessments will be refined before being used to inform regulatory determinations.

Vitter 32a. Can you tell me the agencies plans regarding these assessments?

Vitter 32b. Will further refinements be made before they are used to inform regulatory actions?

Vitter 32c. Why hasn't your office taken steps to clarify how these assessments are used?

Response to 32 a-c: From the beginning of the EPA's efforts to identify chemicals for assessment, the agency has continually stated that the assessments are being developed to determine if risk management actions are needed to address potential risks. In the EPA's 2011 Discussion Guide that stakeholders were provided for engagement on the effort, the EPA's Goal of Prioritization stated that "EPA intends to identify priority chemicals for review and possible risk management under TSCA." When the EPA made public the list of TSCA Work Plan chemicals, we publicly indicated that if an assessment indicates a potential risk of concern, the EPA will evaluate and pursue appropriate risk reduction actions, as warranted. If an assessment indicates negligible risk, the EPA will conclude its current work on the chemical being assessed. This information has consistently been on our TSCA Work Plan website and is in the presentations we routinely make on the Work Plan effort.

Vitter 33. The transparency and openness we would like to see from your office appears to be missing.

What steps will you take to improve your relationships and communications with stakeholders?

Response: The EPA is fully committed to stakeholder and public engagement on this important work. For example, from the earliest stage of the EPA's efforts to identify chemicals for assessment, the EPA has engaged stakeholders and the public. Stakeholders were consulted on the criteria and methodology for identifying chemicals for inclusion on our TSCA existing chemicals work plan and stakeholder comments were seriously considered in developing and implementing the work plan, which was announced in March 2012. The EPA has and will continue to fully engage the public on the chemical specific draft risk assessments during the public comment and peer review process.

Senator Fischer

Endangered Species Act Consultations for Pesticides

Fischer 1. Given that over the 40 year history of the Endangered Species Act, EPA and the Fish and Wildlife Services and National Marine Fisheries Services have not successfully completed a consultation that resulted in a label change, do you believe it appropriate EPA try to solve this deficiency on a selective product-by-product basis that relies on spatial (geographic) bans of product us or significant non-wind-directional buffers that have the long-term potential to decrease land value, arable land available for production, global competitiveness, and production of row crops themselves?

Response: The EPA, working with the US Fish and Wildlife Service and the National Marine Fisheries Service ("the Services"), as well as with the USDA, is establishing a systematic approach to evaluate the potential effects of pesticides on threatened and endangered species. The government's approach will employ the advice from the National Academy of Sciences' 2013 report to ensure that decisions about needed protections are scientifically sound. The government will also ensure that there is robust public participation throughout its review and decision-making process.

Fischer 2. Do you intend to follow this same approach that takes significant U.S. cropland out of production to address this lack of consultation process for every product that goes through registration or re-registration?

Response: As indicated above, the EPA, in consultation with the Services and the USDA, is advancing new scientific methods and ensuring that a more robust public participation process is available to stakeholders. This approach should produce narrowly tailored measures that achieve protection goals and minimize impacts on agriculture and other pesticide users.

Fischer 3. Have you evaluated the impact on U.S. agricultural production and our economy of such an approach?

Response: The EPA, in partnership with the Services and the USDA, is ensuring that the government uses the best available scientific information on agricultural production systems so that practical and reasonable protections for threatened and endangered species can be implemented, if needed.

Senator Fischer with Senator Crapo

Endangered Species Act Consultations for Pesticides

Fischer/Crapo 4. On April 30, a Committee on the National Research Council of the National Academy of Sciences (NAS) made detailed recommendations concerning revisions to the process by which EPA and the Fish and the Wildlife Service or the National Marine Fisheries Service assess risk during the consultation under the Endangered Species Act (ESA) for specific pesticide registration actions taken by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Administration requested this review in March 2011 "to review scientific and technical issues that have arisen as our departments and agencies seek to meet their respective responsibilities under ESA and FIFRA."

Do you believe that the NAS review has achieved its mission?

Response: Yes.

Fischer/Crapo 5. Do you believe that there is more work to be done? Are there other outstanding issues that must be resolved at the intersection of ESA and FIFRA? Do other scientific, technical and policy questions remain?

Response: Yes, more work remains to be done. The EPA, the Services, and the USDA are developing an action plan to implement the advice of the NAS. Establishing a new, shared scientific methodology for assessing the impacts of pesticides on protected species is the first step toward creating an efficient and effective system for meeting the requirements of both the FIFRA and the ESA.

Fischer/Crapo 6. Given the complexities involved, could the development of a response to the NAS report be improved with a public stakeholder process that brings together all parties to work-through those outstanding and unresolved inter-agency policies and procedures?

Response: The EPA, the Services, and the USDA anticipate engaging stakeholders as part of the process of implementing the new risk assessment methodologies. The agencies have already announced and begun to implement new opportunities for stakeholder participation on reviews and decisions involving individual pesticides.

Fischer/Crapo 7. We believe that there is an opportunity here to address years of regulatory frustration and to do so in a way that provides regulatory certainty to all parties. The Administration's letter to the National Academy of Sciences described this issue as "scientifically complex and of high importance." We would like your assurance that you will do your part to pursue and implement a comprehensive process for addressing these scientifically complex and important issues.

Fischer/Crapo 7a. Has the Administration formulated its official response to the NAS report-a "roadmap" if you will-now that the report has been public since April?

Fischer/Crapo 7b. When might that plan become public?

Response to 7 a-b: The EPA, the Services, and the USDA are working diligently to implement the recommendations in the NAS report. We anticipate that we can begin sharing our plans with the public in the fall of 2013.

Senator BOXER. Thank you.
And Mr. Garbow.

STATEMENT OF AVI GARBOW, NOMINATED TO BE GENERAL COUNSEL, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. GARBOW. Thank you, Chairman Boxer.

I would first like to express my appreciation to you and Ranking Member Vitter for holding the hearing. I am also grateful to those committee members and their staff who met with me in anticipation of this hearing.

I would like to take a moment to recognize and thank members of my family, some of whom are here with me today. My wife, Nancy Anderson, my son Tai, my daughter Cady. My oldest son Dylan is hopefully having a great time at sleep-away camp, so is not here today. My folks, Mel and Dene, and my sister Rachel. To each of them, I am grateful for their love, support, and sacrifice for allowing me to do what I think is important and worthy of my kids.

I am also honored that President Obama has nominated me to serve as General Counsel for the U.S. Environmental Protection Agency and, if confirmed, will do my utmost in helping the Agency keep the promise of its vital mission, with fidelity to the law, and will always strive to earn and hold the confidence of the President and of Administrator McCarthy in leading the Office of General Counsel.

My legal career has spanned over 20 years, with a focus on environmental law, and I have held numerous positions in both government service and in the private sector. I should say that every client I have had and every stop I have made along the way has made me a better lawyer, a better manager, and a better public servant.

In 1992, I joined EPA's Office of Enforcement and from that perch learned about the inner workings of Agency rulemakings and saw both the challenges of implementing many provisions of our environmental laws, but also the many successes that result from working with Federal, State, and local partners and other stakeholders to ensure that the benefits and protections of our environmental laws are more fully realized.

In 1997 I joined the Justice Department and because a prosecutor in the Environmental Crimes Section. I thought then, as I do now, that serving in that capacity carried with it an awesome responsibility: to prosecute cases on behalf of the United States with integrity, with constant attention to detail, but also to decline matters when justice so required.

When I left the Department of Justice in 2002, I then worked as a Junior Partner and a Partner, respectively, at two law firms. I had the opportunity to represent individuals, small and large businesses; I provided legal counsel in the homes, businesses, and board rooms of clients; I advocated in courts across the Country, and the opportunity to work in the private sector, for me, enhanced my professional growth. I gained a better understanding of how and why the legal issues that I confronted, whether large or small, were consequential for each of the individuals and businesses with whom I worked, and that is a lesson I carry with me today.

In 2009 I had the privilege of returning to EPA, where I presently serve as Deputy General Counsel. I should note that, upon my return, I received an email from a colleague that simply said, "Welcome home." And it was a sentiment that reminded me of my deep commitment both to the mission of EPA and makes even more humbling the occasion of my nomination.

In the past 4 years, I have worked on significant matters with nearly every office in the Agency, on issues that have touched each of its regions and all of your States. We have worked closely with our esteemed colleagues in the Justice Department to defend the Agency's actions when challenged in the courts of law and, above all, it has been my pleasure and privilege to work with and help to lead the extraordinarily talented and dedicated lawyers and other professionals who work in EPA's Office of General Counsel.

In every instance where I or the Office have been called upon to render legal advice, we have adhered to the principles that our legal analysis and judgment must be presented with candor, be unvarnished, and always directed to the faithful implementation and administration of our Nation's environmental laws. The key environmental laws are, by design, confining in certain respects regarding Agency action, but other provisions of law allow for greater discretion, placing great weight on scientific findings and the judgment of the Administrator. But in either case, I think the Office of General Counsel must continually challenge itself to confront and account for any ideas, interests, or perspectives that may shed light on both well-trodden and new legal paths available to achieve the goals of our laws.

So, if confirmed, I look forward to engaging constructively with Congress, with stakeholders, and with members of the general public on matters that are within the purview of the Office of General Counsel. I commit to listen carefully to all who may seek to advance legal arguments or interpretations that can help our Office provide sound legal advice to Administrator McCarthy, our clients within EPA, and others within the Administration.

Thank you again, Chairman Boxer, Ranking Member Vitter, and the other distinguished members of the committee, and I welcome any questions that you might have.

[The prepared statement of Mr. Garbow follows:]

STATEMENT OF AVI SAMUEL GARBOW

NOMINEE FOR GENERAL COUNSEL, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE

SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

JULY 23, 2013

Thank you, Chairman Boxer.

I would first like to express my appreciation to you, and Ranking Member Vitter, for holding this hearing. I am also grateful to those Committee Members – and their staff – who met and spoke with me in anticipation of this hearing.

I would like to take a moment to recognize, and to thank, my family – some of whom are here with me today. My wife, Nancy Anderson, my son Tai, my daughter Cady, and my oldest son Dylan – who is presently away at summer camp. And my folks – Mel and Dene, and my sister Rachel. To each, I am grateful for their love, support, and sacrifice – for allowing me to do what I believe to be important, and worthy of my children.

I am honored that President Obama has nominated me to serve as General Counsel for the U.S. Environmental Protection Agency. If confirmed, I will do my utmost in helping the Agency keep the promise of its vital mission, with fidelity to the law, and will always strive to earn, and hold, the confidence of the President and of Administrator McCarthy, in leading the Office of General Counsel.

My legal career spans over twenty years, with a focus on environmental law, and I have held numerous positions in government service and in the private sector. Every stop – and every client – has made me a better lawyer, a better manager, and ultimately a better public servant. In 1992, I joined EPA's Office of Enforcement, and soon thereafter had an opportunity to work directly with the Agency's Assistant Administrator for Enforcement and Compliance Assurance. I learned about the inner-workings of Agency rulemakings and saw, through the lens of our enforcement and compliance program, both the challenges of implementing many provisions of our environmental laws, and the many successes that result from working with federal, state, and local partners - and the regulated community - to ensure

that the benefits and protections of our environmental laws are more fully realized. In 1997 I became a prosecutor in the Department of Justice's Environmental Crimes Section. I felt then, as I do now, that serving in that capacity came with an awesome responsibility – to prosecute cases on behalf of the United States with integrity and constant attention to detail, and also to decline to prosecute matters when justice so required. The outcome I was responsible for helping to ensure was not measured on the basis of a particular action or lack thereof, but rather on achieving justice, supported by the facts and based upon a clear-minded reading of the law.

When I left the Department of Justice in 2002, I then worked as a Junior Partner, and Partner, respectively, at two law firms. I had the opportunity to represent individuals, and small and large businesses; I provided legal counsel in the homes, businesses, and board rooms of clients, and advocated in courtrooms across the country. The opportunity to work in the private sector enhanced my professional growth, as I gained a better understanding of how and why the legal issues I confronted, whether complex or relatively simple, were consequential for each of the individuals and businesses with whom I worked. That is a lesson I carry with me.

In 2009 I had the privilege of returning to EPA, where I presently serve as Deputy General Counsel. Upon my return, and though I had last worked at EPA in the mid 1990's, I received an email from a former colleague that said, simply, "Welcome home." That sentiment is a reminder to me of my deep commitment to the mission of EPA, and makes even more humbling the occasion of my nomination.

In the past four years, I have worked on significant matters with nearly every Office within the Agency, and on issues that have touched each of its Regions. We have worked closely with our esteemed colleagues in the Department of Justice to defend the Agency's actions, when challenged in the courts of law. Above all, it has been my pleasure and privilege to work with, and help lead, the extraordinarily talented and dedicated lawyers and other professionals who work in EPA's Office of General Counsel.

In every instance where I, and the Office of General Counsel, have been called upon to render legal advice, we have adhered to the unshakeable principles that our legal analysis, and judgments, must be presented with candor, unvarnished, and always directed towards the faithful implementation and administration of our nation's environmental laws, as the Agency aims to fulfill its mission to protect human health and the environment. The key environmental laws can be, by design, confining in certain ways with respect to Agency action. Other provisions of law allow for greater discretion, placing great weight on scientific findings and the judgment of the Administrator. But in either case, I think that the

Office of General Counsel must continually challenge itself to confront and account for any ideas, interests, and perspectives that may shed light on both well-trodden and new legal paths available to achieve the goals of our laws, and of this Administration.

If confirmed, I look forward to engaging constructively with Congress, with stakeholders, and with members of the general public, on matters that are within the purview of the Office of General Counsel. I commit to listen – carefully – to all who may seek to advance legal arguments or interpretations that can help the Office of General Counsel provide sound legal advice and guidance to Administrator McCarthy, our clients within EPA, and others within the Administration. I look forward, if confirmed, to the opportunity to serve my country, and this Administration, in the role of EPA General Counsel, and will work tirelessly to ensure that we continue to hold ourselves to the highest standards of excellence in performing our duties.

Thank you, again, Chairman Boxer, Ranking Member Vitter, and the other distinguished Members of this Committee. I welcome any questions that you might have.

Questions for the Record
July 23, 2013 Hearing on the Nomination of Avi Garbow
to be General Counsel for the U.S. Environmental Protection Agency
Committee on Environment and Public Works
United State Senate

Senator Boxer

Boxer 1. Mr. Garbow, you spent several years in private practice working for the law firm WilmerHale.

Boxer 1a. Would you say that this law firm works on behalf of clients from industry?

Response: Yes

Boxer 1b. What did you take away from your experience working at WilmerHale in terms of better understanding businesses' perspective on issues?

Response: My legal work representing clients in private practice significantly enhanced my professional growth, and provided me with valuable perspectives on many issues facing small and large businesses. In particular, I saw firsthand the efforts undertaken by many clients to comply with applicable laws, or to address instances of noncompliance, including the financial and human resource implications that attend to legal obligations. During the course of my representation of business clients, I was exposed to many facets of their enterprises, and gained valuable insight into the competing interests and demands often present in multidimensional companies.

Boxer 2. Mr. Garbow, can you describe the factors that you will use to determine whether to advise your client to settle a law suit that is filed by industry or environmental groups against the EPA?

Response: The factors that I would use, if confirmed, to determine whether to advise a client to settle a claim or matter – whether filed by industry or an environmental group – are based upon a case by case assessment of the relevant facts, the legal claims at issue, and an evaluation of the risks associated with the litigation. Such advice would only be rendered after full consultation with lawyers in the Department of Justice assigned to that particular matter.

Boxer 2a. Can you also please describe considerations that arise when EPA is sued over missing mandatory deadlines to issue rules, and whether courts order timelines for Agency action in such cases?

Response: When the EPA is sued for failure to timely adhere to a statutorily mandated duty to act, the agency's legal defenses are generally significantly limited if the agency did in fact miss the statutory deadline. The absence of a legal defense to a claim, or the limited nature of the available defenses, is an important factor when considering the merits of likely litigation outcomes in a lawsuit. In cases in which an agency is found by a court to have violated a statutorily mandated duty, and missed a deadline for action, courts regularly order the agency to expeditiously come into compliance in accordance with a timetable set by the court.

Boxer 2b. Lastly, is it your understanding that any agency rules must comply with the law, including going through notice and comment rulemaking that allows all interested parties an opportunity to participate in the decisions making?

Response: Yes, all agency rulemakings must comply with the law regardless of whether they are related to a case in litigation or a settlement.

Senator Vitter

Topic: Ethics

Vitter 1. In a November 4, 2010, email to an EPA colleague about a citizen-suit lawsuit filed by Sierra Club and WildEarth Guardians alleging that EPA had failed to meet a statutorily-defined deadline, EPA Region 6 Administrator Al Armendariz wrote, "If needed, I can call Jeremy [Nichols] at WEG [WildEarth Guardians] and grab R6 [EPA Region 6] an extended deadline." Armendariz's curriculum vitae states that he worked as a "technical advisor" to WildEarth Guardians, and it also lists Jeremy Nichols, Director of the WildEarth Guardians' Climate & Energy Program, as a reference. At the time (November 4, 2010) Armendariz had been at EPA Region 6 for almost a year, and Wild Earth Guardians had a number of pending lawsuits alleging EPA's non-compliance with statutorily defined deadlines.

Vitter 1a. What is EPA policy on recusal during on-going litigation?

Response: If confirmed, I will support the EPA's Designated Agency Ethics Official (DAEO) in the full and effective execution of his or her duties. I also hold myself and all those who work for me to the highest ethical standards. Pursuant to Designation by the EPA Administrator and 5 CFR § 2638.203, the DAEO is responsible for managing the agency's ethics program.

My understanding is that the EPA's policy on recusal during ongoing litigation is to follow the Standards of Ethical Conduct for Employees of the Executive Branch, which addresses recusal obligations under 5 C.F.R. Part 2635, Subparts D and E. Political appointees may also have additional commitments under the President's Ethics Pledge.

Vitter 1b. Does EPA know the extent to which Administrator Armendariz conducted settlement negotiations with Jeremy Nichols?

Response: I do not have any knowledge about whether former Regional Administrator Armendariz negotiated with Mr. Nichols on this matter.

Vitter 2. On March 12, 2013, I sent a letter to EPA regarding Dr. Al Armendariz's participation in EPA's permitting of the Las Brisas Energy Facility. As you are aware, Dr. Armendariz was an opponent of the facility before he joined EPA and later joined the Sierra Club's "Beyond Coal" campaign. In correspondence obtained by the Committee, Armandariz wrote that "Gina's new air rules will soon be the icing on the cake, on an issue I worked on years before my current job." This letter was sent four months ago, and I understand that it was in final draft form in May.

Vitter 2a. Why has EPA so far failed to send a response to this letter?

Vitter 2b. Why was Armandariz permitted to work on the Las Brisas permit, in light of his prior vocal opposition to the project?

Vitter 2c. Wasn't this an obvious conflict of interest that EPA should have easily identified?

Vitter 2d. Please list all entities in which Dr. Annendariz had an identified conflict-of interest.

Vitter 2e. What are EPA's criteria for identifying a conflict-of-interest?

Vitter 2f. After a conflict-of-interest was identified, how was Dr. Armendariz screened from working on covered projects?

Vitter 2g. Why was Layla Mansuri, an attorney, permitted to work on the Las Brisas permit in light of her previous advocacy against the project prior to her employment at EPA?

Response to Vitter 2a-g: If confirmed, I will support the EPA's Designated Agency Ethics Official (DAEO) in the full and effective execution of his or her duties. I also hold myself and all those who work for me to the highest ethical standards. I commit to work with my colleagues to be responsive to the committee's requests on this and other matters.

Vitter 2h. Can you commit to me that as General Counsel you will implement a policy that will prohibit an appointee from working on a project that they were actively involved in prior to their service at EPA?

Response: If confirmed as General Gounsel, I will commit to working with the agency's DAEO to ensure that any appointee complies with applicable recusal obligations. Pursuant to Designation by the EPA Administrator and 5 CFR § 2638.203, the DAEO is responsible for managing the agency's ethics program.

Vitter 3. On May 15, 2013, I sent a letter to Assistant Administrator Michelle DePass inquiring about her compliance with her ethics pledge. In her pledge, she promised to resign her position as Program Officer with the Ford Foundation upon confirmation. Ms. DePass was confirmed on May 12, 2009, however, she was employed at the Ford Foundation until July 23, 2009.

Why was Ms. DePass permitted to continue as an employee at the Ford Foundation AFTER her confirmation and contrary to her pledge?

Response: I did not participate in any discussions regarding the specific date on which Ms. DePass would commence federal employment. I do understand that she left her work at the Ford Foundation before becoming a federal employee.

Vitter 4. The Committee has identified several examples of EPA employees failing to adhere to EPA's Standards of Ethical Conduct. In the first instance, it appears that former Regional Administrator Al Amendariz and Associate Regional Administrator Layla Mansuri (an attorney) were inappropriately involved in decisions related to the Las Brisas Energy Center, despite their paid advocacy against the facility before their employment at EPA. Additionally, the Committee is concerned that Michelle DePass, Assistant Administrator for the Office of International and Tribal Affairs, violated the clear terms of her ethics pledge when she continued to work at the Ford Foundation after she was confirmed to her position at EPA. These and other potential violations are very serious matters that compromise the integrity of the Agency.

Vitter 4a. As the Agency's Chief Ethics Officer, will you commit to working with the Committee to eliminate these types of ethical lapses?

Response: The General Counsel is not the agency's Chief Ethics Officer; the agency's DAEO serves in that capacity. Nonetheless, if confirmed, I will hold myself and my staff to the highest ethical standards and I commit to working with the agency's DAEO to ensure that all the EPA employees uphold ethics standards and meet their ethics responsibilities.

Vitter 4b. In addition, will you commit to publishing on a public website all ethics filings of senior officials within both EPA headquarters and regional offices?

Response: I do not believe the General Counsel would have authority to make such a commitment. I am aware that under the STOCK Act an e-filing system is under development for the OGE Form 278 (Executive Branch Personnel Public Financial Disclosure Report). I also know that OGE Form 278s, which are required of certain senior headquarters and regional employees, are available to the public upon request.

Vitter 5. While Dr. Armendariz has resigned his position from EPA, Layla Mansuri and Chrissy Mann are still employed by Region 6. Both of these individuals represented entities opposed to the construction and permitting of the LBEC.

Vitter 5a. Has EPA identified conflict-of-interest for either Ms. Mansuri or Ms. Mann?

Vitter 5b. Please list all topics in which EPA has identified a conflict-of-interest.

Vitter 5c. Has either Ms. Mansuri or Ms. Mann worked on any matter related to the LBEC?

Vitter 5d. Has either Ms. Mansuri or Ms. Mann worked on the development of the NSPS rule for greenhouse gases for new power plants Electric Generating Units?

Response to 5a-d: These are specific questions concerning the ethics obligations of individuals, and of which I have no specific knowledge. The EPA's DAEO is the most appropriate person to address these questions.

Topic: FOIA

Vitter 6. According to documents obtained by the Committees, EPA readily granted FOIA fee waivers for environmental allies, effectively subsidizing them, while denying fee waivers and making the FOIA process more difficult for states and conservative groups. Most recently, 12 states have joined in litigation against the EPA to force the Agency to turn over documents relating to sue and settle agreements. So far EPA has steadfastly denied the states very detailed requests.

Vitter 6a. Why has EPA unilaterally denied Fee Waiver Requests to states and local entities?

Response: The EPA does not unilaterally deny fee waiver requests from states and local entities. The EPA evaluates all fee waiver requests on a case by case, request by request basis using the six factors contained in our regulations, located at 40 C.F.R. § 2.107(l)(2) & (3).

Vitter 6b. Does EPA take the position that states will never be able to demonstrate that they have met the criteria to obtain a fee waiver?

Response: No, the EPA does not take that position. The EPA evaluates all fee waiver requests on a case by case, request by request basis using the six factors contained in our regulations, located at 40 C.F.R. § 2.107(l)(2) &(3).

Vitter 6c. Stated another way, can you envision a scenario wherein EPA grants a state's Fee Waiver request?

Response: Yes, I can envision a scenario wherein a state or local entity qualifies for a fee waiver under agency regulations. The EPA evaluates all fee waiver requests on a case by case, request by request basis using the six factors contained in our regulations, located at 40 C.F.R. § 2.107(l)(2) & (3).

Vitter 6d. If EPA can envision a scenario where a state can obtain a fee waiver, please explain why Oklahoma and 11 other states have failed to satisfy that criteria.

Response: The specific Freedom of Information Act (FOIA) request you reference is now in litigation. OGC determined on administrative appeal that it was an improper FOIA request because it failed to meet the legal standard under FOIA and agency regulations to reasonably describe the records sought. A final determination with respect to the merits of the states' fee waiver request was never reached, because it was determined that the request was improper, and so the fee waiver request was moot. A copy of this determination is attached.

The EPA has made multiple efforts to communicate with the states about what information is needed in order to reasonably identify the records they are seeking, and also to provide general feedback on their fee waiver request in order to assist them in resubmitting a request. Should the states choose to resubmit a request that reasonably identifies the records they are seeking, EPA will fairly evaluate any renewed fee waiver request using the six factors, at that time.

Vitter 7. Myself, along with Senator Inhofe and Chairman Issa sent EPA a letter on May 17, 2013, reiterating the request made by the states. We have yet to receive a response from EPA.

When can we expect to receive EPA's response to this letter?
Response: The EPA responded to your May 17, 2013 letter regarding the EPA's processing of fee waiver requests on June 28, 2013. A copy of this response is attached.

I believe your question refers to the April 29, 2013 letter that you, Senator Inhofe, and Congressman Lankford sent to the EPA. As indicated above, the states' similar requests were unable to be processed by the agency because they did not reasonably describe the records being sought. Although your request for documents is not required to conform with the agency's FOIA regulations, the same practical difficulties with identifying the records do apply.

Vitter 8. It is my understanding that Congress – as a coequal branch of government – does not need to request a fee waiver to obtain documents from the executive branch.

Vitter 8a. Do you agree with this statement?

Response: I agree that a request for records from the Speaker of the House, President of the Senate, or members of Congress in his or her capacity as the chair of a congressional committee or subcommittee concerning matters within their jurisdiction is not processed pursuant to the FOIA requirements and regulations, including applicable processing fees.

Vitter 8b. If so, there should not have been a delay – certainly a delay this long – for EPA to begin processing our request. Why has EPA delayed in its response to the May 17, 2013 letter?

Response: The EPA responded to your May 17, 2013 letter regarding the EPA's processing of fee waiver requests on June 28, 2013. A copy of this response is attached.

If your question refers to the April 29, 2013 letter that you, Senator Inhofe, and Congressman Lankford sent to the EPA, any delay in responding to the April 29 request in no way relates to a request for fees. Although your request for documents is not required to conform with the agency's FOIA regulations, the same practical difficulties with identifying the records do apply. Your request, which calls back to the states' even broader September 2012 request, amounts to a request for every document (whether internal or external to the EPA) that relates in any way to communication with any organization with an environmental or natural resource interest, on any of no less than three major environmental statutes that the agency implements, from every single one of the agency's twenty one offices.

Vitter 8c. Will you commit to doing all that is within your power to expedite a response to this request?

Response: If confirmed, I am happy to further discuss this request in order to better understand the information you are seeking and enable the Agency to effectively search for relevant documents.

Vitter 9. During your confirmation hearing I asked you about an EPA email that discussed a standard protocol for responding to FOIA requests. In this email an EPA attorney, Geoffrey Wilcox, instructed that one of the first steps is to alert the requestor that they needed to narrow the request because it is overbroad, and secondarily that it will probably cost more than the amount they agreed to pay. I asked you if such a "standard protocol was appropriate?" You replied that it was not. Moreover, I requested that you follow up on what actions, if any, the Agency had taken to correct this behavior and you committed to do so for the record.

Accordingly, I request that you provide me with an update on any corrective action EPA has taken to address this matter.

Response: As I said at the hearing, I did not know the specific circumstances or context of the email excerpt you read to me. I have since looked into the matter.

At the hearing, I understood the email excerpt to be a general statement of the EPA protocols for responding to all FOIA requests. I have since learned that the email was sent in the context of agency staff responding to two specific, extremely large and overbroad FOIA requests, one of which indicated a willingness to pay only $500 in costs to cover the FOIA request.

The approach described in the email was for responding to "such FOIA requests" (i.e., overbroad FOIA requests with limited commitment to pay fees) and appears to be consistent with the

EPA's FOIA regulations. In responding to broad requests, the EPA's FOIA regulations require employees to communicate with the requester to alert them to the estimated cost to fulfill the request (40 C.F.R. section 2.102(d) and section 2.107(e)), and to advise the requester that the agency will wait for further instructions before proceeding with the request (40 C.F.R. section 107(e)). The EPA is also required to communicate with the requester to provide an opportunity for them to narrow or modify their large request when it results in the need for the agency to request an extension of time to respond. 40 C.F.R. 2.104(d). The EPA's regulations for implementation of FOIA are consistent with the statutory requirements of FOIA itself, and with the Department of Justice's guidance to all agencies for implementation of FOIA. Under these circumstances, I am not aware that any corrective action was deemed appropriate or necessary.

The EPA is working towards establishing national FOIA procedures to further ensure that requests are processed consistently, and according to these and other procedural requirements contained in our regulations. Furthermore, as I referenced during my testimony at the hearing, I understand that the agency intends to provide additional training on FOIA to its workforce by the end of the calendar year.

Vitter 10. In May, I sent a joint letter with Chairman Issa asking EPA to provide our offices with "All FOIA fee waiver requests submitted to EPA between January 21, 2009 and May 16, 2013." This production should include all requests for an appeal. All response letters from EPA to requestors for FOIA fee waivers sent between January 21, 2009, and December 31, 2012, including all responses to an appeal. All EPA materials used to train FOIA officers on processing requests for FOIA fee waivers. I am still waiting for a response.

Vitter 10a. Can you provide a reason as to why EPA has not yet provided this information to the Committees? What is that reason?

Response: I am not familiar with the current status of the agency's response to this request. I will look into the status of this inquiry and help to ensure the agency is responding to this inquiry.

Vitter 10b. Isn't it true that these records, by their nature, do not contain any deliberative or other privileged material as they are correspondence between the Agency and an outside entity?
Response: Response letters from the EPA to a FOIA requestor will not contain any deliberative material. In general, correspondence between the Agency and an outside entity may contain material subject to a personal privacy exemption or the confidential business exemption.

Vitter 10c. Will you commit to me to do all that you can to expedite responding to this request back at the Agency?

Response: I will commit to look into to the status of this response and help to ensure that the agency is responding to this inquiry.

Vitter 11. The Committee has uncovered multiple instances of mis-management of the Agency's obligations under the FOIA. These problems range from the apparent bias in assessing applications for fee waivers, to the unauthorized release of private information of Americans to environmental allies, to the inappropriate application of FOIA exemptions. As the General Counsel, you will play an instrumental role in improving the Agency's performance on this front.

While Acting Administrator Perciasepe committed to following the yet to be issued recommendations of the Inspector General, implementing these reforms should be a top priority.

Will you commit to aid the Committee in its oversight efforts, and to take all necessary steps to address these defects within the Agency?

Response: If confirmed as General Counsel, I will commit to continue my office's role in providing sound legal counsel to the Agency on responding to oversight requests, and fulfilling its obligations under the FOIA, and I look forward to playing a key role in ensuring that any improvements to EPA's processes recommended by the Inspector General are, as needed, implemented quickly and effectively.

Vitter 12. The office of General Counsel is responsible for the Agency's compliance with internal guidelines as well as transparency statutes, such as the Federal Records Act, and the Freedom of Information Act. On March 18, 2013, I sent a letter along with Chairman Issa to Region 9 Administrator Jared Blumenfeld asking him to certify that he had not used his personal email to conduct Agency business. As you are aware, EPA policy explicitly prohibits such activities as it interferes with the Agency's record keeping capabilities. To date, I have not received a response from Mr. Blumenfeld, or from the Agency, answering the very simple question. EPA's response sent on April9, 2013, fails to respond the actual question posed.

Vitter 12a. Accordingly, what actions have you or the office of General Counsel taken to ensure that Mr. Blumenfeld was and is not using his personal email address to conduct Agency business?

Response: The Office of General Counsel contacted Mr. Blumenfeld soon after a federal district court complaint was filed in May suggesting that the Region 9 Administrator had used his personal email account to conduct agency business. At that time, Mr. Blumenfeld was counseled on his obligations under the Federal Records Act, the Freedom of Information Act and the EPA records policy in regard to email use for official agency business and federal records preservation.

Vitter 12b. Has the Office of General Counsel conducted any sort of investigation to determine whether or not Mr. Blumenfeld did in fact use his personal email to conduct Agency business?

Response: The Office of General Counsel is currently working with the EPA's Office of Regional Counsel in Region 9 to respond to a FOIA request that asked for all emails concerning official Agency business transmitted to and from Mr. Blumenfeld's personal email account since November 2009. The EPA has been processing this records request under the FOIA and the EPA regulations, while keeping the requester informed, as required by the FOIA, in regard to the progress being made toward the agency's response.

Vitter 12c. If the Agency did in fact learn that Mr. Blumenfeld had been using his personal email account to conduct Agency business, what corrective actions were taken?

Response: As noted above, the Office of General Counsel has recently been working with Mr. Blumenfeld with respect to his obligations under the agency's email use and federal records preservation policies and is presently engaged in responding to a FOIA request that relates to that

issue. The Office of General Counsel will continue to work with other EPA offices, such as the Office of Environmental Information, to ensure that all agency personnel are actively complying with federal statutes and agency policies relating to email use and official agency business.

Topic: Sue and Settle

Vitter 13. According to a recent survey, since 1993, 98 percent of EPA regulations (196 out of 200) pursuant to three core Clean Air Act programs (NAAQS, NESI-IAP, and NSPS) were promulgated late, by an average of 5.68 years (or 2,072 days) after their respective statutorily defined deadlines. If EPA is out of compliance with all its deadlines, then clearly the Agency has limited resources relative to their statutory responsibilities. Establishing a deadline, therefore, also establishes EPA's priorities. In at least two instances, EPA and environmentalist organizations have litigated to either limit or prevent intervention by state or local officials in settlement discussions.

Given that the Congress expressly stipulated that environmental policymaking by EPA be performed in cooperation with the States, is it appropriate for the Agency to establish its priorities with environmentalist organizations in settlement negotiations that exclude the input of local officials and representatives?

Response: Agency priorities are set by the EPA Administrator, in consultation with senior agency leadership; agency priorities are not established by nongovernmental entities through settlement agreements. As appropriate, the Administrator and agency leadership regularly seek and receive the input of states, tribes, and local officials and representatives in the course of implementing environmental laws and programs.

Vitter 14. OGC lawyers, together with attorneys in the U.S. Department of Justice's Environment and Natural Resources Division, represent the Agency in court. DOJ rules stipulate that, "It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to enjoin discharges of pollutants into the environment only after or on condition that an opportunity is afforded persons (natural or corporate) who are not named as parties to the action to comment on the proposed judgment prior to its entry by the court." Neither EPA nor the Department of Justice allow for public notice and comment of consent decrees or settlement agreements pursuant to the litigation alleging EPA failed to meet non-discretionary duties under the CWA. Rather, DOJ publishes in Federal Register only notice of settlement agreements/consent decrees engendered by enforcement actions.

Would EPA OGC commit to implementing the policy of its partners at the DOJ, and agree to allow for public notice and comment for CWA settlement agreement and consent decrees pursuant to deadline suits, in addition to enforcement actions?

Response: If confirmed, I commit to examining, in consultation with the Department of Justice, the EPA's Office of Water, and other affected entities, the advantages and disadvantages of instituting a policy that may allow for public notice and comment for certain draft settlement agreements and consent decrees in matters where the EPA is alleged to have violated a nondiscretionary duty under the Clean Water Act.

Topic: Human Resources

Vitter 15. Has EPA ever conducted training for use of the People Plus time tracking software?

Response: The issues of time and attendance are managed through the Office of the Chief Financial Officer and not within the purview of the Office of General Counsel, so I am not in a position to provide detail on this specific question. I understand that new employees and new supervisors are instructed on their timekeeping responsibilities through the offices for which they work.

Vitter 16. Is the Agency currently implementing new time and attendance policies? Please identify what these new policies are.

Response: The issues of time and attendance are managed through the Office of the Chief financial Officer and not within the purview of the Office of General Counsel, so I am not in a position to provide detail on this specific question. I understand that the EPA is revising its time and attendance policy to include additional responsibilities for timekeepers and approving officials, as well as system design changes and internal control improvements.

Vitter 17. Please outline EPA's policy on how to manage an underperforming employee.

Response: While management of personnel in the Office of General Counsel (OGC) falls primarily to OGC's Principal Deputy General Counsel, I am a strong believer in the value of regular feedback and open communication between office management and staff. In general, I understand that specific performance management requirements are governed by governmentwide regulations, as well as the requirements of any applicable collective bargaining agreements.

Topic: Chemical Safety Board (CSB)

Vitter 18. Congress established the Chemical Safety Board as a non-regulatory, independent investigatory body yet recently EPA has been attempting to subpoena CSB witness statements and records.

Vitter 18a. Under what legal authority has EPA determined it has access to the CSB's investigatory records?

Response: The EPA has a range of legal authorities that it may invoke to have access to the CSB's investigatory records. Clean Air Act section 112(r)(6)(Q), 42 USC 741(r)(6)(Q), provides that "any records, reports or information obtained by the Board shall be available to the Administrator, the Secretary of Labor, the Congress, and the public." An exception is provided for confidential business information and trade secrets. That exception does not apply to officers, employees, and authorized representatives of the United States when carrying out duties under the Clean Air Act or in any proceeding under the Clean Air Act. Additionally, the EPA has investigative authority under Clean Air Act section 114, 42 USC 7414, to gather information in support of the EPA's activities under the Clean Air Act. Clean Air Act section 307(a), 42 USC 7607(a), provides administrative subpoena authority. With respect to the subpoena authority of the United States through a grand jury proceeding, that authority is vested in the Department of Justice through a court supervised process.

Vitter 18b. Does EPA believe it should follow the Memorandum of Understanding between the Agency and the CSB?

Response: Yes.

Topic: Fuel Economy

Vitter 19. What is your opinion on the application of EPCA to EPA's GHG authority and fact that Mass vs. EPA may have found authority to regulate but did not require it?

Response: In the Massachusetts case, the Supreme Court made it clear that the fact "that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. The EPA has been charged with protecting the public's 'health' and 'welfare,' 42 U.S.C. §7521(a)(1), a statutory obligation wholly independent of the DOT's mandate to promote energy efficiency. See Energy Policy and Conservation Act, § 2(5), 89 Stat. 874, 42 U.S.C. § 6201(5)." 549 U.S. 497, 532 (2007). The Supreme Court also made it clear that "[i]f EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." 549 U.S. at 533.

Vitter 20. When does EPA intend to issue a response to the Alliance/Global ZEV waiver petition for reconsideration filed in March of this year?

Response: Although I understand that the EPA, and in particular the Office of Air and Radiation, has been actively working with the petitioners and other stakeholders on the issues raised in the petition, I have not been involved in the details of those discussions.

Vitter 21. Will the mid-term review be completed before the President leaves office?

Response: In October, 2012, the EPA adopted greenhouse gas (GHG) standards for light-duty motor vehicles covering model years 2017 through 2025. Given the long time frame at issue in implementing the standards for model years 2022–2025, the EPA will conduct a comprehensive mid-term evaluation and agency decision making process for the GHG standards for those model years. The evaluation will determine whether the model year 2022-2025 GHG standards are appropriate under section 202(a) of the Clean Air Act. Under the regulations adopted in that rulemaking, the EPA would be legally bound to make a final decision, by April 1, 2018, on whether the model year 2022–2025 GHG standards are appropriate under section 202(a), in light of the record then before the agency. If, based on the evaluation, the EPA decides that the GHG standards are appropriate under section 202(a), then the EPA will announce that final decision and the basis for the EPA's decision. Where the EPA decides that the standards are not appropriate, the EPA will initiate a rulemaking to adopt standards that are appropriate under section 202(a), which could result in standards that are either less or more stringent. The date on which the mid-term review will conclude thus depends on the substantive decision made by April 1, 2018. Further discussion of the mid-term review can be found at 77 Fed. Reg. 6264, 62784-5 (October 15, 2012).

Topic: CWA

Vitter 22. Do you agree that the CWA does not regulate the flow of water?

Response: In the CWA, the Congress stated its objective to restore and maintain the chemical, physical, and biological integrity of the nation's waters and provided the EPA and the states with an assortment of legal authorities. The decision how the EPA or a state will use these authorities to address a given issue involves very careful consideration of the facts unique to the situation. I commit to work with the EPA's Office of Water and our Regional Offices to ensure that the EPA's use of these authorities is consistent with the words and objectives of Clean Water Act.

Vitter 23. Do you agree that EPA can require permits under Section 402 of the CWA only for discharges of pollutants from a point source to a "water of the United States"?

Response: I agree that Section 402 of the Clean Water Act requires a permit for discharges of any pollutant or combination of pollutants. As defined in Section 502 of the Clean Water Act, this includes discharges to "waters of the United States" from point sources, as well as discharges to waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft.

Vitter 24. Can you assure me that EPA will not attempt to regulate water as a surrogate for a pollutant, in violation of the Eastern District of Virginia's recent decision in VA Dept. of Transportation v. EPA (holding that EPA may not regulate stormwater as a surrogate for a pollutant)?

Response: The EPA did not appeal the decision of the District Court for the Eastern District of Virginia in *VA Dept. of Transportation* v. *EPA.* The EPA is continuing to analyze that decision as it works with states to develop options for establishing total maximum daily loads (TMDLs) under the Clean Water Act to address water quality impairments caused by urban stormwater. While it is not the General Counsel's role to be the final decision maker on agency policy and programs, I look forward to working with the Agency's leadership to ensure that such TMDL efforts are consistent with the Clean Water Act.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 3 1 2013

OFFICE OF
GENERAL COUNSEL

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

Re: Freedom of Information Act Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Dear Mr. Eubanks:

I am responding to your March 15, 2013 fee waiver appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You appealed the February 22, 2013 decision of Larry Gottesman of the U.S. Environmental Protection Agency ("EPA" or "Agency") to deny your request for a fee waiver ("initial fee waiver denial"). You seek a waiver of all fees associated with your FOIA request for documents related to consideration, proposal, or discussion of three subjects related to the Clean Air Act ("CAA") with non-governmental organizations whose purpose may include environmental or natural resource advocacy and policy. You requested a waiver of all fees associated with processing your request, and stated you were willing to pay $5.00 (five dollars) in the event your fee waiver was denied.

On February 22, 2013, Mr. Gottesman, the EPA's National FOIA Officer, denied your request for a fee waiver finding that you had failed to express specific intent to disseminate the information to the general public, thus failing to demonstrate that your request is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter.

I have carefully considered your request for a fee waiver, EPA's initial fee waiver denial, and your appeal. For the reasons set forth below, I have concluded that you do not have a proper request pending before the Agency, and therefore your appeal of the denial of a waiver of fees is moot.

Analysis

In reviewing your February 6, 2013 FOIA request in order to process your fee waiver appeal, this office has determined that your initial request fails to adequately describe the records sought, as required by the FOIA and by EPA's regulations. 5 U.S.C. § 552(a)(3); 40 C.F.R. § 2.102(c). You seek records "which discuss or in any way relate to" any "consideration, proposal,

or discussion with" "Interested Organizations" or any "Other Organizations" on three broad topics related to the Clean Air Act. Request at 1. At least one category of your request (records described in paragraph (a)(i)) is almost identical to a request that was previously denied by EPA as improper on September 14, 2012. While you have tailored the subject matter of the next two categories of records you are seeking ((a)(ii) and (a)(iii)) by focusing only on Regional Haze State Implementation Plans ("SIPs"), you have not provided enough information to permit an employee reasonably familiar with the subject matter to identify the records you are seeking. This is because despite reducing the provided list of "Interested Organizations" from eighty to seventeen, you are still requesting documents related to any communication between EPA and "Other Organizations" which you broadly define as "any other non-governmental organization, including citizen organizations whose purpose or interest may include environmental or natural resource advocacy and policy." Request at 1. This qualifying statement about requesting records from "Other Organizations" effectively re-incorporates the sixty-three excluded organization from the list in your original request, as well as numerous other unnamed organizations, and would require EPA staff to also search for and determine the organizational mission of any 3rd party that may have had a communication with the Agency on topics under the CAA. Broad, sweeping requests lacking specificity are not sufficient. American Fed. of Gov't Employees v. Dep't of Commerce, 632 F.Supp. 1272, 1277 (D.D.C.1986). Additionally, requests for documents which "refer or relate to" a subject are routinely "subject to criticism as overbroad since life, like law, is 'a seamless web,' and all documents 'relate' to all others in some remote fashion." Massachusetts v. Dep't of Health & Human Servs., 727 F.Supp. 35, 36 n.2 (D.Mass 1989).

Additionally, paragraph (b) of your request is nearly identical to the request previously denied by EPA as an improper request on September 14, 2012. Instead of requesting "all documents" that in any way relate to the three broad categories of your request from every single headquarters and regional EPA office, you have requested records from sixteen different offices instead of twenty-one. Request at 2-3. You are requesting all documents sent or received by staff in sixteen EPA offices on three general subjects, for a period of almost four and a half years. Such "all documents" requests have been found by courts to be improper. *See*, Dale v. IRS, 238 F.Supp 2d 99, 104 (D.D.C. 2002); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir.1977). By way of comparison, a recent District of Columbia decision found that a similar request that amounted to a request for all internal emails of 25 individuals over a two year period failed to reasonably describe the records sought, and was unreasonably burdensome. Hainey v. U.S. Dep't of Interior, No. 11-1725 (2013 WL 659090 (D.D.C.)). The court found that the burden of amassing this volume of information, in addition to the time needed to review the records, conflicted with settled case law that "an agency need not honor a [FOIA] request that requires 'an unreasonably burdensome search'" and that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." Id. At *8-9 (internal citations omitted).

For the reasons stated above, I have determined that your request does not reasonably identify the records you are seeking. Because this is your second attempt at submitting a properly formulated request, I will take this opportunity to indicate how your request might be modified to reasonably identify the records you are seeking. In order to reasonably identify the records you are seeking, you should identify the records with particular specificity. EPA regulations state that "whenever possible you should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter" and also that "[t]he more specific you are about the records or type of records you want, the more likely EPA will be able to identify and locate records responsive to your request." 40 C.F.R. § 2.103(c). Often this is accomplished by providing key words which employees may use to easily search for and determine if there are responsive records. For example, should you limit your request to records communicating with any *specifically identified* organization AND referencing settlement relating to the three subject areas you identify, your request would enable EPA staff familiar with the subject area to search for and locate any responsive records.

Because I have determined that you do not have a proper request pending before the Agency, your appeal of EPA's initial denial of a fee waiver for your request is moot, and I am closing your appeal file. Although I need not address the merits of your fee waiver request and appeal at this time, I have included the following discussion in order to assist you in submitting any properly formulated request for records and a waiver of fees.

Fee Waiver Discussion

The statutory standard for evaluating fee waiver requests is whether "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government; and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

EPA's regulations at 40 C.F.R. § 2.107(l)(2) and (3) establish the same standard. EPA must consider four conditions to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2). EPA must consider two conditions to determine whether a request is primarily in the commercial interest of the requester: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 C.F.R. § 2.107(l)(3).

Finally, the Agency considers fee waiver requests on a case-by-case basis. Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 60 (D.D.C. 2002). Whether a requester may have

received a fee waiver in the past is not relevant for a subsequent request.

Public Interest Prong of the Fee Waiver Test

A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is in the public interest and is not primarily in the requester's commercial interest. See Judicial Watch, Inc., 185 F. Supp. 2d at 60; Larson v. CIA, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See McClellan Ecological Seepage Situation, 835 F.2d at 1285; Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. Larson, 843 F.2d at 1483. Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483.

Elements 2 and 4

I will discuss the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be "meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). The disclosure of information already in the public domain would have no informative value since it would not add to the public's understanding of government. Id. The fourth factor to consider is how the disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public's understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

In support of your request, you generally state that "[t]he requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States." Request at 4. You also state that "disclosure 'is likely to contribute' to an understanding of government operations or activities'" and "disclosure is likely to contribute 'significantly' to public understanding of government operations and activities" (repeating the regulatory

standard). Request at 5. These general statements are typically insufficient to support a waiver of fees . Judicial Watch Inc. v. DOJ, 185 F.Supp 2d 54, 61-62 (D.D.C. 2002). You also state that "the public currently has no access to the requested Subject information," however information about the Clean Air Act, Regional Haze, and the public comment process around negotiated settlements is available on the Agency's program website[1] as well as on the websites of the Regional Planning Organizations' and States' sites. Request at 8; Appeal at 7.

Your less generalized statements in support of factors two and four also fail to demonstrate that your request satisfies the standard established by these elements. You state that your request seeks "information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest," that will help "understand and make public EPA's decision-making process in negotiating and entering into litigation settlements," and will educate the public on "the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs." Request at 7; Appeal at 3. As compared to the broad categories of your request, there is no clear nexus between the records requested and the areas of education identified above. For example, your request is in no way limited to communications with non-governmental organizations, or to discussions about cooperative federalism. Numerous records you have requested will not shed any light on these subjects, and you have not explained how all of the requested records will meaningfully inform the public about these stated topics.

Element 3

Additionally, the requester seeking a fee waiver must also demonstrate that the disclosure of the requested documents will likely contribute to the public understanding, *i.e.*, the understanding of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 107(l)(2)(iii). The requester's expertise in the subject area and his or her "ability and intention to effectively convey information to the public will be considered." Id. A requester must express a specific intent to publish or disseminate the requested information, and identify a specific increase in public understanding that would result from such dissemination. Judicial Watch, Inc.v. DOJ, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). A requester who does not provide specific information regarding a method of disseminating requested information will not meet the third factor, even if the requester has the ability to disseminate information. Judicial Watch, Inc. V. DOJ, 122 F. Supp. 2d 13, 18-19 (D.D.C. 2000).

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[1] *See, e.g.* http://www.epa.gov/airquality/visibility/program.html; http://www.epa.gov/airquality/visibility/actions.html.

You state that the "Requesting States" will compile and summarize the requested records into a report that will be distributed to the general public, the media, and Congress. Appeal at 6. You also state that the report will be available state libraries and web sites. Id. These general statements do not provide enough information to demonstrate a tangible or cognizable plan to disseminate the information. See, Van Fripp v. Parks, 2000 U.S. Dist. LEXIS 20158, *20 (D.D.C. Mar. 16, 2000) ("Obtaining placement in a library is, at best, a passive method of distribution that does not discharge the plaintiff's affirmative burden to disseminate information."). While it is possible that a report written using information obtained from the Agency could be informative, these general statements about passive methods of distribution, especially when unaccompanied by details about the authorship of a report by the staff of thirteen different state governments or about the intended audience, fails to demonstrate a specific intent to publish or disseminate the requested information.

This discussion above is being provided to you in order to assist you in understanding the Agency's obligations to evaluate fee waiver requests using the standards contained in EPA's regulations and the FOIA. Should you choose to submit a new request, please feel free to contact the Agency's FOIA Office for information about what you may provide in order to submit a proper request, and to provide the information necessary for the Agency to evaluate a request for a fee waiver.

Conclusion

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Lynn Kelly at 202-564-3266 if you have any questions regarding this determination.

Sincerely,

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 28 2013

OFFICE OF THE
ADMINISTRATOR

The Honorable David Vitter
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Senator Vitter:

Thank you for your letter of May 17, 2013, regarding the Environmental Protection Agency's Freedom of Information Act (FOIA) fee waiver process. I appreciate the opportunity to respond to these issues.

First, and let me be clear, it is not the practice of the EPA to deny or grant fee waivers to any group or individual based on ideology. The EPA follows the established FOIA regulations which provide several factors in determining when a fee waiver can be granted. These regulations can be found at 40 C.F.R. § 2.107. We have also provided an enclosure to this letter for information regarding these factors. In addition, the EPA's regulations governing the FOIA process, including the fee waiver process, can be found on the EPA's website at http://www.epa.gov/foia/.

FOIA requires all federal agencies to promulgate regulations for the collection of fees associated with responding to FOIA requests. The EPA's fee regulations are consistent with the guidance provided by the Department of Justice in its "Freedom of Information Act Guide." Under the EPA FOIA regulations, the agency charges a fee to process any FOIA request, unless the fee is waived or under a *de minimis* level. This fee relates to the direct costs the agency incurs when searching for, duplicating, and retrieving the requested records. These direct costs may include a portion of the salary of the employee performing the work and the cost of operating duplication equipment.

Upon receipt of a fee waiver request containing insufficient information, the EPA's FOIA Office may send a letter to the requestor seeking information on the factors on which a decision is made. These factors will help the FOIA Office to determine whether the requestor has adequately demonstrated that the request meets the standard for a waiver of fees. Fee waiver decisions are made on a case-by-case basis, because, as stated above, the EPA is not permitted to grant fee waivers to requestors on a class basis. Fee waiver decisions are also made on a request-by-request basis: the fact that a requester received a fee waiver for one request does not mean

that requester will receive a fee waiver for the next request. If an initial request for a fee waiver is denied, a requester can submit an administrative appeal to the agency, and seek a review of the initial decision within 30 days of the denial by sending a letter of appeal to the agency via email or through FOIA Online. These appeals are then independently reviewed by staff in the Office of General Counsel, who issue a decision on the appeal.

After receiving your letter, we reviewed the requests for fee waivers that the agency received, and determined that the agency acted appropriately. However, it is important to note that the EPA has taken the additional step of asking the agency's Inspector General to also review relevant information and policies.

In the time period of January 1, 2012 – April 26, 2013, the EPA received 892 requests for fee waivers. Of those 892 requests, 535 were denied (approximately 60 percent) and 357 were granted (approximately 40 percent). The majority of those denied were attributed to not meeting the requirements as laid out in factors two and three, which are outlined in the enclosure. It is important to note, that for the 535 FOIA requests where a fee waiver request was denied, the EPA only collected fees for 37 of those requests. Generally, this was due to the fact that these requests ultimately did not exceed the $14.00 *de minimis* cost threshold to process FOIA requests. In addition, we have determined that the median fee paid for the FOIA fees collected during this time period was $70.85.

With respect to Competitive Enterprise Institute (CEI), during the above-referenced time period, CEI submitted 16 fee waiver requests. Of those requests, 10 (or 64 percent) were granted, either initially or on appeal. The other six requests were denied because they did not meet the requirements laid out in factors two and three. Nevertheless, for the five CEI fee waiver requests the EPA denied, CEI did not have to pay for these FOIA requests because they did not exceed the $14.00 threshold to process FOIA requests.

Again, thank you again for your letter. The EPA remains committed to conducting its activities with the highest legal and ethical standards and in the public interest. If you have any questions, please feel free to contact me or your staff may contact Arvin Ganesan, the EPA's Associate Administrator or Congressional and Intergovernmental Relations at (202) 564-4741.

Sincerely,

Bob Perciasepe
Acting Administrator

Enclosure

cc: The Honorable Barbara Boxer
Chairman

Factors EPA Considers in FOIA Fee Waiver Determinations

The six factors that determine whether or not a fee waiver is granted or denied are as follows:

- Factor One: The subject of a request: Whether the subject of the requested records concerns, "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote.

- Factor Two: The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

- Factor Three: The contribution of an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding". The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requestor. A requestor's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.

- Factor Four: The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced significantly by the disclosure. The FOIA Office will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

- Factor Five: The existence and magnitude of a commercial interest: Whether the requestor has a commercial interest that would be furthered by the requested disclosure. The FOIA Office will consider any commercial interest of the requestor or of any person on whose behalf the requestor may be acting, that would be furthered by the requested

disclosure. Requestors will be given the opportunity in the administrative process to provide explanatory information regarding this consideration.

- Factor Six: The primary interest in disclosure: Whether any identified commercial interest of the requestor is sufficiently large, in comparison with the public interest in disclosure that disclosure is "primarily in the commercial interest of the requestor". A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The FOIA Office ordinarily will presume that when a news media requestor has satisfied the public interest standard, the public interest will be the interest primarily served by the disclosure to that requestor. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

Senator Inhofe

Inhofe 1. As EPA's General Counsel, would you commit to EPA posting on its website copies of all complaints filed against EPA as a result of notices of intent to sue?

Response: Many documents filed in the EPA's defensive environmental cases are already available on the Office of General Counsel (OGC) website.[1] In addition, notices of intent to sue the EPA are available.[2] Neither of these sites routinely makes available complaints filed against the EPA. I agree this information might be of value to interested stakeholders, and, if confirmed, commit to work with OGC lawyers and technical staff to explore options for making complaints more readily available to the public.

Inhofe 2. As EPA's General Counsel, would you commit to EPA posting on its website copies of any proposed consent decrees 30 days before submitting them to a court of law?

Response: If confirmed, I commit to examining, in consultation with the Department of Justice, the EPA leadership, and other affected entities, the advantages and disadvantages of posting all proposed consent decrees before submitting them to a court.

Inhofe 3. Out of all the rules for which EPA has deadlines, how many of them have been met? And, how many of those deadlines have been missed?

Response: My understanding is that neither the Office of General Counsel, nor the agency more broadly, maintains an inventory of all the rules that the EPA has issued that is linked to statutory deadlines, nor do we maintain an inventory of all statutory deadlines.

Inhofe 4. Do you believe that under the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix) EPA's Science Advisory Board (SAB) is authorized and obliged to respond to congressional inquiries from relevant committees of substantive jurisdiction about its activities?

Response: I have not worked directly with the specific authorities contained in the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix) and how they apply to the EPA's Science Advisory Board (SAB). If confirmed as the EPA General Counsel, I commit to review the FACA, including any authorities and obligations it may contain with regard to the SAB interactions with relevant congressional committees, and work with the OGC staff and the SAB to ensure the SAB complies with appropriate authorities when responding to any congressional requests pending before it.

Inhofe 5. Can you commit to this Committee that, as EPA General Counsel, you will review all pending requests for information from Congress to EPA's Science Advisory Board (SAB) and will clearly communicate to the members of the SAB that it is appropriate and obligatory that they respond to such inquiries in a timely manner?

Response: If confirmed, I commit to review any congressional requests presently pending before the SAB and to work with the OGC staff and the SAB to ensure the SAB complies with

[1] http://www.epa.gov/ogc/documents.htm
[2] http://epa.gov/ogc/noi.html

appropriate authorities when responding.

Inhofe 6. Continuing Job Losses Analysis (321 (a)): Since 1977, section 321 (a) of the Clean Air Act has required "the Administrator to conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement." EPA has never conducted a section 321 (a) study to consider the impact of Clean Air Act programs on jobs and shifts in employment. The §321 requirement is different than the requirement from Executive Order 12866 that EPA consider in a Regulatory Impact Analysis (RIA) what impact a single proposed rule will likely have on jobs. For §321, EPA has to consider the impact that existing Clean Air Act requirements – taken as a whole – have had on job losses and shifts in employment throughout our economy. RIAs, by contrast, only consider the potential future employment impact that a single proposed rule will have. Therefore, EPA's preparation of RIAs for new rules docs not satisfy §321(a).

Inhofe 6a. Has EPA ever conducted a study or evaluation under section 321 of the Clean Air Act? If so, when and, as EPA's General Counsel, would you commit to EPA posting on its websites, copies of those studies and/or evaluations?

Response: The EPA has found no records that contain studies or evaluations under section 321 of the Clean Air Act since passage of the 1977 Amendments, when the Congress enacted section 321.

Inhofe 6b. As EPA's General Counsel, would you commit to complying with section 321 of the Clean Air Act and ensuring that EPA evaluates on a continuing basis how air quality regulations, taken as a whole, affect jobs and shifts in employment?

Response: CAA section 321 authorizes the Administrator to investigate, report and make recommendations regarding employer or employee allegations that requirements under the Clean Air Act will adversely affect employment. In keeping with congressional intent, the EPA has not interpreted this provision to require the EPA to conduct employment investigations in taking regulatory actions. Section 321 was instead intended to protect employees in individual companies by providing a mechanism for the EPA to investigate allegations that specific requirements, including enforcement actions, as applied to those individual companies, would result in layoffs. The EPA has found no records indicating that any administration since 1977 has interpreted section 321 to require job impacts analysis for rulemaking actions. The EPA does perform detailed RIAs for each major rule it issues, including cost benefit analysis, various types of economic impacts analysis, and analysis of any significant small business impacts. Since 2009, the EPA has focused increased attention on consideration and (where data and methods permit) assessment of potential employment effects as part of the routine RIAs conducted for each major rule.

Inhofe 7. Sue and Settle: "Sue and settle" occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors - with no participation by other affected parties or the public. As a result of the "Sue and Settle" process, the agency intentionally transforms itself from an

independent actor that has discretion to perform its duties in a manner best serving the public interest, into an actor subservient to the binding terms of settlement agreements, including using its congressionally- appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process-review by OMB and other agencies, reviews under Executive Orders, and review by other stakeholders - at the critical moment when the agency's new obligations are created. For the past four years, EPA has actively engaged in settlements with environmental advocacy groups that result in new commitments to write rules on specified timetables and to undertake other new activities.

Inhofe 7a. Would you support efforts to improve the transparency of this process and allow affected parties, including states and industry, to participate in the process, including settlement negotiations, to ensure that all interests are represented?

Response: I am absolutely committed to supporting appropriate efforts to improve transparency in EPA decision making processes. If confirmed, I intend to have an open door policy for stakeholders to discuss legal issues of concern to help ensure that our legal analysis is guided by the fullest consideration of relevant information.

Inhofe 7b. As EPA's General Counsel, what would you do to ensure that the agency does not agree to deadlines through settlements that do not provide sufficient time for EPA to meet its obligations under the Administrative Procedure Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, OMB Circular A-4, and other requirements that apply to EPA?

Response: If confirmed, I will counsel the agency to provide sufficient time in any schedule set by settlement agreement to ensure the time periods allocated for any particular agency action are sufficient to fulfill all legal requirements.

Inhofe 7c. In a recent denial of several environmental groups' petition for a rulemaking under the Clean Air Act, Acting Administrator Robert Perciasepe stated that, "[e]ven under the best circumstances, the EPA cannot undertake simultaneously all actions related to clearly determined priorities as well as those requested by the public, and so the agency must afford precedence to certain actions while deferring others.... The EPA must prioritize its undertakings to efficiently use its remaining resources."

Inhofe 7c (i). How do you prioritize the rulemakings that EPA decides to pursue?

Response: Agency priorities are set by the Administrator, in consultation with senior agency leadership.

Inhofe 7c (ii). Would you agree that the new commitments that EPA agrees to in "sue and settle" agreements with environmental groups, including timetables for rulemakings, have an impact on EPA's priorities as to the rulemakings that it undertakes?

Response: The agency does not commit in any settlement to any action that is not otherwise authorized by law. The agency thoughtfully and deliberately develops priorities for each of its program areas. Where a statute establishes mandatory duties for agency action, and the agency

has missed a mandated deadline, the initiation of legal proceedings against the agency, and any resolution of those claims, can have an impact on the allocation of resources.

Inhofe 7c (iii). Would you agree that the new commitments that EPA agrees to in "sue and settle" agreements with environmental groups, including timetables for rulemakings, have an impact on EPA's budget?
Response: The agency does not commit in any settlement to any action that is not otherwise authorized by law. The allocation of resources within the EPA's appropriated budget can be affected by legal proceedings against the agency, or the resolution of those claims, where the agency has missed a mandatory statutory deadline.

Inhofe 8. Cooperative Federalism is also a major concern of mine, especially as it is related to the Clean Air Act.

Inhofe 8a. Will you commit to working to improve the "cooperative" nature of "cooperative federalism" so that the EPA works with states instead of against them?

Response: Yes, I commit to work with states, and will seek opportunities to improve areas of cooperation with states that are within the purview of the Office of General Counsel. I agree that an effective working relationship between the EPA and state governments is important to Clean Air Act (CAA) implementation.

Inhofe 8b. Will you commit to approving Federal Implementation Plans only after the EPA has exhausted all of its resources to remedy a State Implementation Plan?

Response: The CAA gives both states and the EPA authorities and responsibilities to provide clean air and protect public health. The EPA has a mandatory duty under the CAA to promulgate a Federal Implementation Plan (FIP) in certain circumstances that are required by law when a state does not meet its State Implementation Plan (SIP) obligations under the CAA. In general, the EPA strives to avoid situations in which a FIP is necessary. The EPA's strong preference is for states to develop and submit their own SIPs that meet the CAA requirements, and the EPA works with states to help them to develop approvable SIPs in order to avoid a FIP in the first instance, or to replace a FIP with an approvable SIP as soon as possible. If confirmed, my role as General Counsel would be to ensure that the relevant agency decision makers are advised of the CAA legal obligations and authority related to FIPs and SIPs, which I commit to do.

Senator Fischer

Numeric Effluent Limits

Fischer 1. Is EPA planning to propose regulation of municipal separate storm sewer flow amounts and numeric effluent limits for pollutants? If so, what is EPA's statutory authority to consider regulating such flows and numeric effluent limits for pollutants?

Response: While it is not the General Counsel's role to be the final decision maker on agency policy and programs, if confirmed I look forward to working with the agency's leadership to fully consider these issues. My understanding is that the EPA is considering revisions to its stormwater rules that may include performance standards for stormwater discharges that could require sites to incorporate sustainable stormwater controls as the sites are developed and redeveloped – the time when it is most cost effective to do so.

The authority for any such proposed rule is section 402(p)(6) of the Clean Water Act, 33. U.S.C. § 1342(p)(6), which provides that:

> "[T]he Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5) which designates stormwater discharges, other than those described in paragraph 2 [discharges already regulated] to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (b) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate. "

Consent Decrees

Fischer 2. Section 402 of the Clean Water Act authorizes and directs the issuance of NPDES permits for discharges to the nation's waters. Such permits act as shields against EPA and state enforcement and citizen lawsuits so long as the permittee remains in compliance with its permit. In light of this, what is EPA's authority for requiring civil consent decrees in lieu of, or in addition to, NPDES permits for publicly treatment facilities, combined sewer overflows, and municipal separate storm sewer systems? Further, what is the authority for EPA insisting on civil consent decrees to implement green infrastructure by local governments?

Response: While it is not the General Counsel's role to be the final decision maker on agency policy and programs, if confirmed I look forward to working with the agency's leadership to fully consider these issues.

Senator BOXER. Thank you so much. So I just want to thank colleagues for being here today because I just can't imagine how anyone here listening to each of you could question your qualifications, your experience, and, frankly, your humility that you bring to the table; and it is so refreshing and I am so hopeful we can make this work for you and for your families.

I also want to ask the families and the friends who are here with our nominees to stand, if they would, for a moment. Please stand up, family and friends. And to the young people who are here, we are just so proud of your family member for taking on this challenge, and I thank all of you for being here today because you make your sacrifices. Please sit, and thank you very much.

I want to start with our legal counsel.

Mr. Garbow, what impresses is the breadth of experience that you have, particularly as I listen to my colleagues on the other side, their concerns, because I think the fact that you did take a break and you did go to the private sector should give them a good feeling that you know how life looks from that side. And I place into the record—I know you worked for Wilmer Hale—the breadth of their clientele, some of whom were Boeing, Citi Group, Chrysler, General Electric, Monsanto, Kodak, and banks, etcetera. And I do feel, this is very critical, that when you do your recommendations, you said it well yourself, you have to be, of course, confined to the law, but there are times when you will make a decision that is your best reading of it and how it will work best.

So I am going to ask you this question: Is it the job of the general counsel to make policy or to advise policymakers on the applicable legal requirements when implementing our Nation's environmental laws?

Mr. GARBOW. Thank you, Chairman Boxer. I don't think that it is the general counsel's position, if you will, to make policy at the Agency. I think lawyers function best, and certainly the general counsel, I think, functions best at the Agency when he or she is able to provide legal advice to inform and guide policy decisions. But I do not view our office as being a house, if you will, for making such decisions.

Senator BOXER. That is very important to our colleagues and to all of us, because that is the point, and that is why we need someone there with your type of background who sees it from all the various lenses, and I am hopeful that you will gain support for this position.

Mr. Jones, as you heard, we are going to take a look at reforming TSCA. There are two recent bills that were introduced, both by Senator Lautenberg, and other bills that have been reported on TSCA in other committees. We are going to have an all-day hearing next week. And I know you don't take position on any of the bills, but will you be ready to give us the technical advice? Because we will be crafting a compromise and we are going to need your help. Would you be ready, willing, and able to help us through that, given all your experience?

Mr. JONES. Thank you, Chairman Boxer. I very much look forward to providing the committee any technical advice that you need as you craft a TSCA reform bill.

Senator BOXER. Thank you.

And Mr. Kopocis, I just want to say you should be voted out of this committee with enthusiasm. And I know people are very concerned, and they should be, and so am I, about the definition of waters of the United States. We could all come up with our own definition. I know what I would like mine to be, given my State. I am sure Senator Fischer knows what she would like it to be, and on and on. Each of us would have our own definition of where there should be some Federal regulation. At the end of the day, it is going to be done, after you review many, many comments, as I understand it, that are coming in by the hundreds, if not by the thousands.

I am not going to ask you a question. I am going to keep the record open and I am going to have some written questions for all of you to answer, please; about a total of 10 for all combined.

But when I go back to 2007 and the breakthrough work that Senator Inhofe and I were able to do on the WRDA bill, I have to tell the committee something. It was Ken Kopocis who said Louisiana is in trouble. It was Ken Kopocis who said we need to look at how we can help them post-Katrina. You know, it wasn't easy for a lot of us, we all have our problems, but it was Ken Kopocis who said this is what you really need to do. It had nothing to do with partisanship or anything else.

And I remember your work getting that done, it was so difficult, and working with all of us to get it done. So I would just hope, again, that when we come down to—people can vote no in protest. Lord knows I have done that enough times in my life, voted no in protest. But we need to move these through. Right now I know, Ken, you are working as a consultant, as I understand it, to the EPA, and we have an acting person. That is terrific, but I think when there is frustration—and I feel it here in the committee, and I don't have any problem with it because, indeed, these are very important issues—you want someone that you can go to who has that confirmation behind him or her so you can hold them accountable. So I am hopeful that we will move all of these quickly, these nominees.

Senator Vitter.

Senator VITTER. Madam Chair, Senator Inhofe has to go to another engagement, so I am going to let him go now.

Senator BOXER. Sure.

Senator INHOFE. Thank you, Madam Chairman, and thank you, Senator Vitter.

Mr. Garbow, in our meeting that we had in my office, we had the opportunity to discuss the 6th Circuit Court decision I mentioned in my opening statement. I trust you have had an opportunity to review that case since that time. Now, since the letter of the law and the court's opinion are so clear, what is your position now? Are you going to be willing to expand the 6th Circuit decision nationwide so that there is a clear regulatory standard? And the reason I ask that, I mentioned that in my opening statement, I also mentioned that there are other cases where the reverse was true. So what is going to be your attitude now in that case?

Mr. GARBOW. Senator, thank you for the question, and I do recall discussing this at our meeting and I did, as I said I would, undertake to find out more about both the case and the memo that you

describe. As you know, the case dealt with the circuit court's interpretation of an Agency regulation dealing with the relationship, if you will, between an oil and gas sweetening plant and some wells for purposes of a determination; and there was, I think, after that circuit decision, with counsel of the Justice Department and obviously discussions with the client, a decision made, as evidenced by a memo that you referenced, to only apply that decision within the 6th Circuit.

I should point out that I don't think that that practice, if you will, is limited to either our Agency or, for that matter, this Administration; it, I think, finds support as well in just the general notion of the Federal system, where different circuit courts approach things differently, as you may have heard, a law of a circuit, things are different.

So what I can commit, Senator, to do is to go back to that memo. I understand that it was to be conveyed to States and potential permit applicants to see how it is being implemented, if you will, elsewhere in the Country. Certainly, in future instances like this, if confirmed, I would look very carefully at the pros and cons for taking this approach. I think, above all, my concern, Senator, if confirmed, would be not only to ensure that we got some consistency and a good understanding of why we are applying decisions one way versus the other, but primarily to make sure that the Agency operates, again, as Senator Vitter has pointed out, in a transparent way; that we communicate with clarity.

Senator INHOFE. OK, I am really sorry, but my time has almost expired just on this one answer. Is it yes or no?

Mr. GARBOW. I will go back and look at the memo, Senator, and explore the case. I cannot commit right now.

Senator INHOFE. OK. That is fine.

Senator Cardin mentioned, Mr. Kopocis, you and I, actually, we came in the same year, so we were with you in 1987. It has been a long friendship, I might add. You are aware that agencies tried to link the hydraulic fracturing to groundwater contaminations three different times. I mentioned this, Pavilion in Wyoming, Debbick in Pennsylvania, Range Resources. And then, of course, Senator Crapo talked about the most egregious case out there. And this is the same question that I asked Lisa Jackson some time ago. Are you aware of any documented cases of groundwater contamination being definitively caused by hydraulic fracturing? Short answer, if you would, please.

Mr. KOPOCIS. No, I am not.

Senator INHOFE. Thank you very much.

I have a question for all three of you having to do with the sue and settle issue. It has really been concerning to me, but I was encouraged that the Agency recently allowed the National Association of Manufacturers to be at least somewhat involved in a recent lawsuit involving the development of the new ozone standard. The question for all three of you, and, if you would like, you can go ahead and answer it for the record, but be really definitive. Will you commit to engaging with industry groups that will be affected by settlement agreements with non-Governmental organizations before those agreements have been entered into? If you would like

to give me a short answer now, that is fine; if not, for the record would be fine.

Mr. GARBOW. If I may, Senator, with respect to your question, I will commit to have, if confirmed, an open door and respond to any requests to meet and——

Senator INHOFE. OK, that is a good answer. That is a good answer.

Anybody else agree with that?

Mr. KOPOCIS. Well, I would say that that has been my track record. I have always been willing to listen to anybody's point of view, and that would certainly continue if I were confirmed.

Senator INHOFE. I appreciate that very much.

Mr. Jones.

Mr. JONES. Same answer applies to myself. Thank you, sir.

Senator INHOFE. Very good.

Thank you very much, Madam Chairman.

Senator BOXER. Thank you so much, Senator.

Senator Whitehouse.

Senator WHITEHOUSE. Just to follow up on Senator Inhofe's questioning. I assume that in the case of litigation that is brought by corporations and by industry and by polluters and so forth, that you would be equally willing, on a reciprocal basis, to make sure that whatever courtesies are offered industry in environmental litigation, the same courtesies are offered to environmental organizations in corporate-driven litigation.

Mr. GARBOW. Senator, I can commit to basically look with neutrality, if you will, as to each complaint. It really doesn't matter, I think, to the Agency, nor would it to me, if confirmed as general counsel, whether a plaintiff comes from an industry trade association or an environmental group. I think that, in applying the law, we need to both, in rendering our own legal judgments and working with the Justice Department, be both impartial and treat each side, if you will, with equal respect.

Senator WHITEHOUSE. Mr. Kopocis, as you know from our discussion in my office, I am concerned about the problem of stormwater runoff into Narragansett Bay. We have spent, I don't have the number ready to mind, but I want to say north of $160 million in our State to build a combined sewer overflow facility that can protect the Bay. We are now seeing significant improvements. The line above which you are not allowed to keep shellfish you have caught has moved north. The line above which it is not safe to swim has moved north. The Blackstone River and the Providence River have been opened to fishing. So we are moving in the right direction, but we have virtually all of Narragansett Bay, but only 40 percent of the watershed. And if our friends in Massachusetts continue to dump stormwater runoff into the rivers that flow through Rhode Island and into our Bay, they get the benefit of not having to spend the money; we pay the price with our Bay. It is a little bit like being a downwind State under the Clean Air Act, where the dirty States upwind enjoy burning cheap goal, they build great big smokestacks so that their people are protected and they dump their pollution on my State and we end up with kids in the hospital in my State. Not a great circumstance.

So on the water side, particularly in light of the delays we have seen in the Chesapeake rule that had been the subject of an agreement with an organization down here, where do we stand and how are we going to move forward on stormwater runoff?

Mr. KOPOCIS. Well, thank you very much for the question, Senator Whitehouse, and I do recall our good discussion when we met in your office. The Agency is actively working on revisions to its stormwater rule. It is trying to take a new look at the stormwater issues and develop new approaches that can provide not only the water quality benefits that I believe everybody seeks, but also understand that there are additional benefits associated with controlling stormwater, in some instances which create an incentive for these upstream communities that you have in your circumstance to undertake efforts to address stormwater.

The Agency has been working with communities, been working with the national associations associated with communities, etcetera, to try to develop this suite of options. The Agency is looking to move from the more traditional, what we call the grey infrastructure, which for years was basically how quickly can you have a pipe that takes the stormwater and throws it downstream, with little regard for the impacts downstream, and, instead, looking at green infrastructure, which retains more of that stormwater onsite, lessens downstream flows, and, of course, reduces the amount of pollution that might be introduced downstream.

The Agency has identified a lot of ancillary benefits associated with that. As you said, reducing stormwater, but also for CSOs. If less water is introduced into the system, there are fewer problems with combined sewer overflows. It can also serve benefits such as groundwater recharge, reduced flooding, reduced erosion and siltation. Recreational values. Many communities are moving back to the water and they want to take advantage of those kinds of values. Improved air quality, reduction——

Senator WHITEHOUSE. So what will you be doing to achieve those values with the stormwater runoff rules?

Mr. KOPOCIS. Well, in the stormwater runoff rule, what we are trying to do is fashion a way to encourage those kinds of activities that will keep stormwater where it falls, rather than have it be rapidly sent downstream. In your instance, I know a good deal of the runoff for Rhode Island comes from Massachusetts.

Senator WHITEHOUSE. Short of filing an original action in the U.S. Supreme Court and suing them directly under the Constitution, you are all we have got. That is why EPA is important and I look forward to working with you on this. My time has expired.

Mr. KOPOCIS. Thank you very much.

Senator BOXER. Senator Vitter.

Senator VITTER. Thank you, Madam Chair.

Mr. Kopocis, would you agree that this waters of the United States issue is certainly very significant and important by any standard and is a significant threshold jurisdictional issue?

Mr. KOPOCIS. Yes, sir, I would.

Senator VITTER. Given that, what is the argument for deciding this by mere guidance? What is the advantage, apart from ease for EPA, apart from minimizing legal ability to challenge whatever EPA comes up with?

Mr. KOPOCIS. Well, thank you for the question, Senator. I think that the decision of the Agency to move forward on guidance was made with the belief that it would most benefit both the regulated community and the regulators to provide some greater clarity in the application of the jurisdiction of the Clean Water Act following the two decisions of the Supreme Court in SWANCC and Rapanos.

Senator VITTER. I don't want to interrupt you; you can certainly finish your answer, but I want to be cognizant of the time. But my specific question is why guidance and not a formal rulemaking, given the clearly significant nature of this decision?

Mr. KOPOCIS. Senator, the decision to move forward on the guidance was made before I was with the Agency, and the Agency has also been simultaneously moving to develop a rule. I should always point out that both the guidance and the rule would be an action done jointly by both EPA and the Army Corps of Engineers, since it is a program which is jointly administered by the two agencies. But the agencies are moving forward to develop a rule to submit to OMB that would then be put out for public notice and comment.

Senator VITTER. What is your understanding of the reason they are doing this by guidance, at least first? Even though it predates you, what is the advantage of doing that versus what would seem to be natural for something this significant, which is a rulemaking?

Mr. KOPOCIS. The use of guidance, of course, is not unusual. Following the two Supreme Court cases, the prior administration issued guidance to try to help the regulated community understand the impact of those decisions. It is administratively easier to issue guidance, and my understanding was that both agencies were seeking to provide greater clarity in a more timely fashion, and then would follow up with formal rulemaking action.

Senator VITTER. What is the specific legal authority for doing something this significant by guidance?

And I would ask Mr. Garbow to answer the same question.

Mr. KOPOCIS. Well, the Agency has general authority to issue guidance or to issue other interpretive documents associated with both the statutes or the regulations that it administers, so that would have been the authority. I am unaware, and I will defer to our Office of General Counsel, but I am unaware of any specific statutory authority in the Clean Water Act in relation to guidance. There is specific authority in the Clean Water Act for the Agency to issue regulations.

Senator VITTER. Mr. Garbow, what is the specific authority for doing something this significant by guidance?

Mr. GARBOW. Senator Vitter, I don't have a different answer than Mr. Kopocis gave. My understanding is that the authority to issue the guidance can be found in part perhaps in the Administrative Procedure Act. But I am unaware of anything, for example, in the Clean Water Act that speaks directly to the selection of a guidance versus a rulemaking as a mechanism.

Senator VITTER. There is certainly specific language in the Clean Water Act regarding rulemaking, correct?

Mr. GARBOW. I believe that is correct, of course.

Senator VITTER. OK. Well, again, this is extremely troubling for all of us on the Republican side, and I think you hit the nail on the head when you said, in your last answer, Mr. Kopocis, that it

is easier for the EPA. It sure is. There is a lot less opportunity for input and challenge, and it is easier for the EPA. That is not compelling, in my mind.

Mr. Kopocis, on the issue of Pebble Mine, we are also very, very troubled by this preemptive watershed assessment, which is completely unnecessary, not mandated by the law. How much money has EPA spent to date on this preemptive watershed assessment?

Mr. KOPOCIS. Senator, my understanding is that the agency, through earlier this year, has spent approximately $2.4 million in external costs. I do not know of an estimate of internal cost to the Agency.

Senator VITTER. OK. That is the figure I have for external contract work. Also, $170,000 on a conference for peer reviewers. But you are right, that doesn't include anything internal. That is very significant, so what is the rationale for doing something that is not mandated, that is not necessary, and that is preemptive?

Mr. KOPOCIS. Well, approximately 3 years ago the Agency was petitioned by a number of residents and entities in Alaska to exercise its authority under 404 to stop a permit from being issued for a proposed Pebble Mine. The agency chose to not favorably respond to that petition, but instead decided to take up the assessment, which is currently underway. It was based in part upon the level of interest associated with that proposed mine, the size of the proposed mine, and the significance of the resources in the Bristol Bay watershed that could be affected.

Senator VITTER. Well, again, in closing, Madam Chair, let me just say that this is completely preemptive and unnecessary, and we think it would be far more constructive for the EPA to do what is in the law, react to a specific permit application.

Senator BOXER. Thank you, Senator.

Senator Fischer.

Senator FISCHER. Thank you, Madam Chair.

Mr. Kopocis, I am sure that you understand the concerns that our farmers have with the guidance proposal that Senator Vitter was talking about. I would like to ask you about a document that I found on your website that states that agricultural exemptions will remain under the proposed guidance. Are you familiar with that document? It is the Agricultural Exemptions Remain.

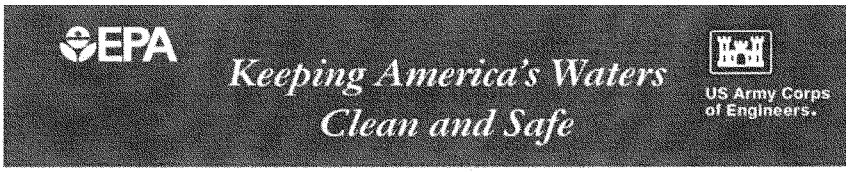
Mr. KOPOCIS. OK. I am not sure exactly what document, but I am very familiar with the agricultural exemptions that are in the Clean Water Act, yes.

Senator FISCHER. OK.

Madam Chair, if I could have that entered into the record, the document.

Senator BOXER. Without objection, so ordered.

[The referenced document follows:]



Agriculture Exemptions Remain

The proposed guidance from EPA and the Army Corps of Engineers does not change the exemptions for farming under the Clean Water Act and current regulations.

EPA and the Corps have worked with the U.S. Department of Agriculture to ensure that concerns raised by farmers and the agricultural industry have been addressed in the proposed guidance.

There are no changes to the existing agriculture exemptions.

These exemptions continue to apply to:

- Agricultural stormwater discharges and return flows from irrigated agriculture.
- Normal, ongoing agricultural, silvicultural and ranching activities.
- Normal activities related to construction and maintenance of irrigation ditches, and maintenance of drainage ditches.
- Normal activities associated with construction or maintenance of farm, forest, and temporary mining roads.

In addition, the proposed guidance does not impact the following waterbodies, which often are associated with agricultural activities:

- Non-tidal drainage and irrigation ditches not connected to a jurisdictional water.
- Artificially irrigated areas that would revert to upland if irrigation stops.
- Artificial lakes or ponds used purposes such as stock watering.
- Artificial ornamental waters created for primarily aesthetic reasons.
- Water-filled depressions created as a result of construction activity.

This guidance does not address the regulatory exclusions from coverage under the CWA for waste treatment systems and prior converted cropland, or practices for identifying waste treatment systems and prior converted cropland.

The proposed guidance clarifies protection for streams that flow long distances before reaching traditionally navigable waters, small streams, streams that flow for only part of the year, and many wetlands and ponds that cumulatively affect the health of the nation's navigable waters. These are the waters that help retain floodwaters that might otherwise flood valuable cropland and that help ensure a safe supply of water for drinking, irrigation, and livestock watering.

Farmers benefit when healthy wetlands and streams are able to trap and store floodwaters so that fields and crops are not damaged or destroyed during floods. Farmers and ranchers depend on clean water for stock watering to help ensure healthy livestock and irrigation to help ensure a safe food supply — in fact, 31 percent of all surface freshwater withdrawals in the U.S. are for irrigation. In addition, farmers benefit when drinking water is clean and safe to drink, without need for expensive treatment.

Working Together to Protect Waters of the US

The Clean Water Act is one of the Nation's most effective environmental laws, calling for the federal government, states and tribes to work together to achieve its goals. Since its enactment in 1972, the condition of rivers, lakes, streams, wetlands, and coastal waters across the country has dramatically improved. In addition, by protecting the health of the Nation's aquatic ecosystems, federal, state and tribal efforts have helped assure that water is safe to drink and that fish and shellfish are safe to eat. While states and tribes may chose to be more environmentally protective than the Clean Water Act requires, the Act establishes an important baseline of water quality for all Americans.

What are Waters of the United States?

"Waters of the U.S." are those waters protected by the federal Clean Water Act, as interpreted by government regulations and the U.S. Supreme Court. Waters of the U.S. include waters that are traditionally navigable, the territorial seas, waters that are located on or serve as state boundaries, and tributaries, adjacent wetlands, and other waters with a "significant nexus" to traditionally navigable or interstate waters. Waters of the U.S. also include tributaries that are relatively permanent (including seasonal) and wetlands that have a continuous connection to those tributaries. Because water moves in hydrologic cycles, all of the environmental and economic benefits that these aquatic ecosystems provide are at risk if some elements are protected and others are not.

Senator FISCHER. Thank you so much.

The document states in part, "The guidance does not address the regulatory exclusions from coverage under the CWA for waste treatment systems and prior converted crop land, or practices for identifying waste treatment systems and prior converted crop land."

So, based on that statement, I am not clear whether the well-recognized regulatory exemption for prior converted crop lands would remain in place under this proposed guidance. Can you tell me if the guidance is going to affect that in any way for the prior converted crop lands exemption?

Mr. KOPOCIS. Well, I can say, of course, a final guidance document has not been issued, but there has been no attempt in either the draft guidance or in the documents that are currently under consideration to in any way adversely affect the current exemptions for prior converted crop land.

Senator FISCHER. So you are telling me that exemption would still remain for that prior converted crop land, in your opinion right now?

Mr. KOPOCIS. Yes. That is the current working theory within the Agency, yes.

Senator FISCHER. OK. What if you have prior converted crop land and it is converted to a non-agricultural use? Would the farmer lose that exemption just because he decides that he is going to use his property in another manner?

Mr. KOPOCIS. Well, the nature of the exemption would depend on what that post-crop activity might be. There might be a need for a permit or it may be an activity which continues to not need a permit.

Senator FISCHER. Can you give me an example of what an activity would be that wouldn't require a permit?

Mr. KOPOCIS. Well, there are a number of exemptions from the permit program from the 404 permit program that are in Section 404(f). They are a variety of activities associated, a lot of them substantially associated with agriculture, but others have to deal with maintenance of stormwater ditches. Those kinds of things are also activities which would not need a permit, irrespective of whether the land was in an agricultural use or not.

Senator FISCHER. Thank you. In February, the EPA released a draft of its national rivers and stream assessment, and it attempts to survey the ecological conditions of streams and rivers throughout the Country. As EPA's headline in a press release announced to the American public, the Agency found in the assessment that more than half of the Nation's rivers and streams are in poor condition, and the EPA's Office of Water Acting Assistant Administrator Nancy Stoner stated that America's streams and rivers are under significant pressure, although she didn't elaborate, necessarily, on who or what is putting pressure on these waterways. The implicit suggestion, from reading that report, is that agriculture and industry are the culprits.

I have a problem with that assessment. I think to determine water quality conditions across the Country, when we looked at that, EPA compared the sampling results with conditions at least disturbed sites around the Country in different regions, and accord-

ing to the EPA, this least disturbed benchmark standard is defined as those sites that are least disturbed by human activities, so it is water bodies where humans really aren't. I think that creates a problem on how the assessment is made.

Do you think that that needs to be looked at, on what benchmark we are using so it gives us a more realistic assessment?

Mr. KOPOCIS. Senator, thank you. I know that there have been a number of questions raised about the way EPA developed its benchmarks for conducting the water quality assessment. If confirmed, I can commit to going back, asking our people to take another look at that and reconfirming what is the appropriate way for EPA to set benchmarks for conducting this assessment. But as we all know, it has been very important for many years to answer the question of how well are we doing, and I think that was a big component of what the Agency was trying to do. I think it is very valuable information and I can commit to working with you on that.

Senator FISCHER. Thank you so much. I appreciate it.

Thank you, Madam Chair.

Senator BOXER. Thanks. Coming from my great State, that has so much agriculture, a huge amount, probably 600 different specialty crops at this point, when land is converted for other uses, for example, Senator Fischer, in our case we lose the land, the ag land to heavy development. They move right under the county and they have to abide by those rules. But if they are going to continue with the kind of uses that you describe, I think they can retain the benefits of that zoning. But I thought that question was very important.

Senator Boozman.

Senator BOOZMAN. Thank you, Madam Chair.

We appreciate all of you being here. It is especially good to see you, Mr. Kopocis. I enjoyed very much working with you on the House side.

I think the guidance thing really is important. Have past administrations used guidance when it comes to something like waters of the United States in the past, with such high stakes?

Mr. KOPOCIS. Yes. Both of the Supreme Court cases came out during the prior administration, and they twice issued guidance. One I believe was in 2003 following the SWANCC decision, and then there was another one in 2008 following the Rapanos decision of 2006.

Senator BOOZMAN. OK. I do think that from a public policy perspective it certainly would be good to have stakeholder input, those that you are regulating, as you bring something out of the importance of the guidance concerning the waters of the United States. In the past there has been a real effort to try and pass a law that would do what the guidance says. Congress was not able to do that, and it does appear that this is just a way to circumvent the will of Congress and I think the will of the public without getting stakeholder input.

Mr. Kopocis, the one thing that is a bother to me is it always seems like the Agency really touts the fact that they are open to the States and the States make the decision, and yet when it seems to be a decision that the State doesn't agree with, then the EPA comes down and says, well, this is the way it is going to be. Can you talk a little bit about cooperative federalism and maybe give

some examples of decisions that when the States do disagree, that they should be allowed to go ahead with that disagreement?

Mr. KOPOCIS. Well, thank you very much for the question. Our environmental laws are set up with State partners. As you are probably aware, for example, the Clean Water Act, the permitting authority for that rests in 46 of the 50 States. So they are the front-line entity that administers that Act. There are comparable numbers for the Safe Drinking Water Act in terms of ensuring that our water supplies are safe.

EPA and its regional offices, we like to think we work collaboratively with the States. I will not suggest to you that I haven't heard many instances over the years of some frustration on the part of the States, but EPA is committed to addressing the unique needs of the individual States. I know that there are variabilities among our regions and among the States in how the interaction exists between EPA and the individual States, and, if I am confirmed, I am committed to continuing in expanding those availabilities of flexibility and a willingness to consider the circumstances of each of the States.

Senator BOOZMAN. So if the State of Arkansas, community in Arkansas, working with the State, came up with a different nutrient requirement than EPA, then the State would have the ability to go forward with their requirement?

Mr. KOPOCIS. Actually, nutrients is an example where EPA has been very interested in working with States to tailor the nutrient requirements for that particular State. As you may know, the Agency has been asked to come up with nationwide criteria associated with nutrients and so far has chosen not to do so. The Agency believes that there are opportunities for the individual States to address their needs.

As is the case for the entirety of the Clean Water Act, EPA does establish and publish national water quality criteria for a variety of pollutants, but States are free to make modifications to that. EPA does have an approval role for that, but there are States that have chosen to do something other than what EPA may have recommended. As I said, nutrients is one that is a current issue that is of great importance to the States and to water quality nationally, and we are working with that.

Senator BOOZMAN. I don't mean to interrupt, but one of the frustrations I have, in fact, the administrator of D.C. Water was in testifying not too long ago and he was talking about the requirements put on them and the situation of possibly having to implement another requirement that would cost $1 billion for really what I think everyone agrees would be very, very little good in the sense of increasing the quality of the water. That is a huge problem; not only here, but throughout the Country. Are you aware of that? Will you commit to addressing—and, again, you have the difference within the regions.

Mr. KOPOCIS. Yes, Senator. If confirmed, I can commit to continuing the dialog. I have had the pleasure of sitting in on a meeting with the head of D.C. Water. He has a compelling case which he has been making and now, of course, that situation is subject to a consent decree which would require participation beyond just EPA.

Senator BOOZMAN. Thank you, Madam Chair.

Senator BOXER. Thank you.

Senator Cardin, your turn for questions.

Senator CARDIN. Thank you, Madam Chair.

I thank all of our witnesses for their response to the questions that have been asked by the members of the committee. It is interesting. There is going to be different views on this committee on the interpretation of laws. On navigable waters, put me down for the Senator who believes that traditional understanding is what should be done. We should regulate the waters that are appropriate for public safety and health and that the Administration is trying to move in that direction.

I also want to just underscore the point, Madam Chairman, that I hear Senators on both sides of the aisle talk about the importance of predictability, of getting guidance. They say even if we don't like what the rules are, the public has to know what the rules are; and I think this Administration is trying to move in that direction to give some predictability to the laws.

But on navigable waters, to me, what we always thought the law to be, what the rule should be, made sense, and I would hope that we would allow the Environmental Protection Agency to carry out its responsibility.

The three individuals that are before us, their qualifications have not been challenged by any member of this committee. The record hasn't been challenged. They are in public service because they believe in public service, and they want to continue in public service. So none of that has really been challenged.

The challenge appears to be in different interpretations on how our laws should be applied. And that is legitimate. It is legitimate for us as oversight to deal with that. But we are in much stronger position, as the legislative branch of Government, when we have a confirmed head of an agency to deal with, rather than acting head of an agency.

And we can go through this again and continue to just have acting heads, and we will continue to hear from the public their outrage about the uncertainty and the lack of accountability. We are in better shape if we carry out our responsibility. And our responsibility is twofold here, Madam Chairman. One is for us to consider these nominations based upon their qualifications. And unless there is an extraordinary reason to the contrary, none of which have been shown on these three nominees, to allow an up or down vote on the floor of the U.S. Senate in a timely manner.

Then, second our responsibility, and here is where I am going to concur with my friends on the other side of the aisle, we have an oversight responsibility. We have a responsibility to challenge the way that the Administration is administering the laws. We also have an opportunity to change those laws, and we should take advantage of it. And I want to compliment the Chair of this committee because she has been open to that during her chairmanship. She has given every opportunity for us to carry out our responsibilities.

But I get a little testy on this case because one of the nominees has been waiting 2 years. He was nominated 2 years ago. It is not like a person we don't know. We know him well and we respect

him greatly on both sides of the aisle. And the challenge has been that some don't like the Agency. Not the person, not the person's view, not the person's competency; we don't like the Agency and we still believe that we can affect that through the nomination process by holding up nominees, which to me makes very little sense.

So, Madam Chair, I don't have any specific questions, but I just wanted to underscore the point that I think we should carry out our responsibility, and I strongly support the three nominees and I hope that we can move them promptly to the floor.

Senator BOXER. Thank you.

So I am going to ask each of you now to respond yes or nay to each of these three questions.

Senator BOOZMAN. Madam Chair. Madam Chair, could I just ask that I have some additional questions?

Senator BOXER. We are going to have all the questions——

Senator BOOZMAN. Not now, but to be submitted.

Senator BOXER. Oh, I am going to lay that out. We have to get all the questions in by Thursday at 5 p.m. I am going to ask the nominees please to answer them very quickly. I have begun discussions staff-to-staff with Senator Vitter. We are hoping, if those answers come back and there is some satisfaction here, that we can move to a vote. We are hopeful, very hopeful.

The answers from you, 10 a.m. on Monday.

But let me close by saying this. I know you are going to laugh at this, but for this committee, both sides of the aisle, you are a dream team, because Mr. Kopocis has worked on WRDA 2007 and worked in the most bipartisan fashion I have ever seen to that point. Mr. Jones has served with, I believe, five different Presidents—is that right?—over the years, Republicans, Democrats. And Mr. Garbow has shown his interest in public sector/private sector, working with some of the biggest corporations. So there is no reason to hold it up.

So I am going to ask each of you do you agree, if confirmed, to appear before this committee or designated members of this committee and any other appropriate committees of the Congress and provide information subject to appropriate and necessary security protection with respect to your responsibilities?

Mr. KOPOCIS. Yes, I do.

Mr. JONES. Yes.

Mr. GARBOW. Yes.

Senator BOXER. Do you agree to ensure that testimony, briefings, documents, and electronic and other forms of communication of information are provided to this committee and its staff and other appropriate committees in a timely fashion?

Mr. KOPOCIS. Yes.

Mr. JONES. Yes.

Mr. GARBOW. Yes.

Senator BOXER. Do you know of any matters which you may or may not have disclosed that might place you in any conflict of interest if you are confirmed?

Mr. KOPOCIS. No.

Mr. JONES. No.

Mr. GARBOW. No.

Senator BOXER. OK. I am going to turn the gavel over to Senator Cardin because there are colleagues that still want to do some more questions. I just want to say, and you can tell from what I have said, that I am proud of you all, I am proud of your families, and I really am going to do everything in my power to personalize this, if it gets to that, to make the case that we need you in your positions.

So, with that, I will call on Senator Vitter for his second round and I will give the gavel to Senator Cardin, ask him to move over here, if he would.

Senator VITTER. Thank you, Madam Chairman.

Mr. Garbow, as you know, a big set of concerns of Republicans on the committee has been the need for increased transparency and accountability. That touches a number of different issue areas affecting your office, including handling FOIA requests. One of the most disturbing emails we came across in doing this work was about a FOIA request, and out of your office, the top legal office of EPA came an email with regard to a FOIA request: "Unless something has changed, my understanding is that there are some standard protocols we usually follow in such FOIA requests. One of the first steps is to alert the requester that they need to narrow their request because it is over-broad and, secondarily, that it will probably cost more than the amount of dollars they agreed to pay. Unless and until they respond to that and tell us they will pay more, we usually tell them in writing that we are suspending our response to their request until they get back to us."

Now, this was not a suggestion about a specific request. As is very clear, this is a description of "standard protocols." Do you think that is appropriate?

Mr. GARBOW. I do not, Senator, and I can tell you that, if confirmed, the only standard of practice with respect to FOIA that I will condone and promote in the Office of General Counsel is to look at the request and to apply the law.

Senator VITTER. And in the case of this particular email, what was the consequence of this advice and this email coming from this individual in your office?

Mr. GARBOW. I am unfamiliar with the email, Senator, so I don't know what the consequence was.

Senator VITTER. Well, if you could get back to us regarding any negative consequence related to that email because, to date, I know of none.

Mr. GARBOW. I will look into that, Senator.

Senator VITTER. And that is re-asking a question we sent in writing 4 months ago and has not been responded to.

Now, pursuant to sort of discussion related to Gina McCarthy's nomination, EPA has agreed to move forward with mandatory retraining of their work force on FOIA, on records management, on the use of personal email accounts, and you have agreed to issue new guidance pending completion of an audit by the inspector general. Can you apprise us of the progress of all of that and your commitment to it?

Mr. GARBOW. Senator, I would be happy to tell you what I know. With respect to what I think is the inspector general's audit dealing with electronic records management, it is my understanding

that we have not yet received a final report from them. Our office will certainly carefully review it, and I look forward to seeing whatever recommendations come from that process.

With respect to FOIA training, it is my understanding though the FOIA training is generally administered through a different office at the Agency, that we have committed to you and others to do Agency-wide FOIA training by the end of this year. I have not heard that we are on any other schedule other than that, but I don't have any further information to provide you at this point in time.

Senator VITTER. OK. And what about your personal commitment to these exercises?

Mr. GARBOW. I am absolutely, Senator Vitter, committed to ensuring that folks in the Agency are well trained, timely trained on FOIA and any other matters of legal concern. I will, of course, take our responsibilities in the General Counsel's Office, if confirmed, very seriously. So I do think that we ought to pursue these sorts of transparency things that I think can enhance the interests of the United States.

Senator VITTER. And will the Office of General Counsel, and you personally, be directly involved in all of that?

Mr. GARBOW. Senator, I will be as involved as I can. I don't know that our office has a pivotal role in each of the items that you have mentioned, but I do think we do have a role. We will certainly provide advice and support, both as needed, and I will make it a special effort on my own, if confirmed, to make sure to track and to look into those things.

Senator VITTER. OK, thank you. That is all I have.

Senator CARDIN [presiding]. Senator Fischer.

Senator FISCHER. Thank you, Senator.

I just have a short question for Mr. Jones and Mr. Garbow. I didn't want you to feel left out or that I was slighting you in any way, so I wanted you to be included.

Mr. Jones, I am concerned about the process for granting partial exemptions from the chemical data reporting requirements of the Toxic Substances Control Act. Although the regulations anticipate a review period of 120 days, I know of several people who are still waiting for a decision from EPA after more than 600 days. I am asking if you will work with the committee to find ways where we can reduce this problem, and will you assure timely consideration of these petitions?

Mr. JONES. Thank you, Senator Fischer. Yes, the situation that you are describing came to my attention just a week ago or so. As you may know, we were, last year at this time, the reporting was being required of manufacturers, and as we were focusing on the reporting implementation, we lost sight of someone was requesting an exemption for the next reporting cycle, which is actually 2013 to 2016. It has been brought to our attention and we are going to work to make a decision on the exemption requests in front of us within the next month. But I would be happy to work with the committee to ensure that in the future we do not lose sight of timely requests of any form.

Senator FISCHER. Thank you. As you know, I am new to the Senate, I am new to the committee, so I find the hearing process need-

ed for all members to have a chance to ask questions and get the responses on the record, so thank you.

What specifically would you recommend doing to try and expedite that process?

Mr. JONES. Thank you, Senator Fischer. So in this case I think it was really about losing track of something in front of us. The other crush of business became a distraction, so it is really about ensuring we have appropriate tracking. If this had been in front of management, I think we could have disposed of it rather quickly. This particular request was not very complex. But having an appropriate tracking system in place would, I think, solve the problem.

Senator FISCHER. Thank you, sir.

Mr. Garbow, I do appreciate you coming to my office, and I appreciated the conversation that we were able to have there. At that time I talked about the aerial surveillance over a number of livestock operations in the State of Nebraska and the concern that those people felt it was a violation of their privacy. But there are also concerns because homes are near these operations, so people have, I guess, a reasonable expectation of privacy, especially with regards to their families and their family home. How would you address those concerns and where do you see this going in the future?

Mr. GARBOW. Thank you, Senator, and I also appreciate the conversation we were able to have when we last met.

I think that I and the Agency takes very seriously the privacy concerns expressed by you on behalf of your constituents and other Americans, and certainly with respect to the issue of aerial overflights the key issue certainly that we in the Office of General Counsel need to focus on is what happens, if you will, to any records, pictures, etcetera, that result from those activities. I think they need to be treated with care. We need to examine, upon any request, whether there are any exemptions relating to privacy or otherwise that might apply to them, and I think we have to carefully apply the law.

So in terms of where this is heading, the actual overflights are not run out of the Office of General Counsel. I am certain that there is an important communication element, an element relating to stakeholder involvement and understanding, but I also think that we need to be very focused on those very privacy concerns that you have addressed.

Senator FISCHER. I guess I would ask you again, though, where do you see it headed? Do you know that there was a release of very private information, confidential information, from a number of people involved in agriculture and that it was called back? That doesn't make it better. It is not all good that you release the information and you call it back. So what are you going to put in place to make sure this doesn't happen again?

Mr. GARBOW. Thank you, Senator. The release that I think you are referring to, of course, didn't happen in connection with overflights.

Senator FISCHER. The overflights, correct.

Mr. GARBOW. It was a separate information request.

Senator FISCHER. But you also commented on the information you gained from these aerial surveillance and the privacy concerns with those as well.

Mr. GARBOW. That is right. I think at its core, Senator, the Agency needs to carefully look at its FOIA practices. I should also note that aside from the training that the Agency is undergoing with respect to FOIA, including, of course, the lawful of application of any and all exemptions, how we have to look at those, that I have recently learned that our Inspector General's Office will also be looking into Agency's practices with respect to release of records. So we will look forward to the results of that audit.

Senator FISCHER. Thank you, and thank all three of you gentlemen, and thank you to your families for being here today and supporting them. Thank you so much.

Senator CARDIN. I repeat our thanks for your patience and your willingness to put your names forward to serve our Country in a very important agency, the Environmental Protection Agency.

The chairman has already announced the deadlines when questions can be submitted for the record. We hope members will exercise restraint here so that you can have a somewhat peaceful weekend, but you never know.

Again, we thank you and, with that, the committee will stand adjourned.

[Whereupon, at 11:43 a.m. the committee was adjourned.]

[Additional material submitted for the record follows:]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 10-22777-CIV-MOORE/SIMONTON

NEW HOPE POWER COMPANY, and
OKEELANTA CORPORATION,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS OF
ENGINEERS and STEVEN L. STOCKTON,
in his official capacity as Director of Civil
Works, United States Army Corps of
Engineers,

Defendants.
_____/

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT; DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Plaintiffs' Motion for Preliminary Injunction and for Summary Judgment (ECF No. 18) and Defendants' Cross-Motion for Summary Judgment (ECF No. 27). These motions are now fully briefed.

UPON CONSIDERATION of the Motions, the Responses, the Replies, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. BACKGROUND

Plaintiffs in this case are Okeelanta Corporation ("Okeelanta"), a Florida sugarcane grower, and New Hope Power Company ("New Hope"), a renewable energy company. In this action, brought pursuant to the Administrative Procedure Act ("APA"), Plaintiffs allege that

Defendants United States Army Corps of Engineers ("the Corps") and Steven L. Stockton ("Stockton"), the Corps' Director of Civil Works, have improperly extended the Corps' jurisdiction under the Clean Water Act ("CWA") by enacting new legislative rules related to prior converted croplands[1] without allowing the required public notice period. Specifically, Plaintiffs allege that Defendants' new rules have improperly extended the Corps' jurisdiction to situations where (1) prior converted croplands are converted to non-agricultural use; and (2) dry lands are maintained using continuous pumping. Under this new rule, wetland determinations are made based on what the property's characteristics would be if the pumping ceased Therefore, Plaintiffs seek to have the new rules set aside.

A. History of the CWA

The CWA is a statute which seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Since 1972, pursuant to section 404 of the CWA, the Corps has regulated the "navigable waters" of the United States. See 33 U.S.C. § 1344(a). "Wetlands" are considered "navigable waters" that are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b) (emphasis added).

In 1977, the Corps released Final Rules that clarified that the phrase "under normal circumstances" in the regulation does not refer to properties "that once were wetlands and part of

[1] Prior converted croplands are "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible." 58 Fed. Reg. 45008-01, at 45031.

an aquatic system, but which, in the past, have been transformed into dry land for various purposes." 42 Fed. Reg. 37122, 37122 (July 19, 1977). Thus, former wetlands that were altered to dry land before the CWA's passage were exempted from the delineation of "wetlands."

In 1986, the Corps released a Regulatory Guidance Letter ("RGL") stating:

> [I]t is our intent under Section 404 to regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time. The wetland definition is designed to achieve this intent. [] Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such natural circumstances are not what is meant by 'normal circumstances' in the definition quoted above. 'Normal circumstances' are determined on the basis of an area's characteristics and use, at present and recent past. Thus if a former wetland has been converted to another use [other than by recent unauthorized activity] and that use alters its wetland characteristics to such an extent that it is no longer a 'water of the United States,' that area will no longer come under the Corps' regulatory jurisdiction for purposes of Section 404.

RGL 86-9 (Aug. 27, 1986) (ECF No. 18-10); see also RGL 05-06 (Dec. 7, 2005) (ECF No. 18-11) (stating that RGL 86-9 still applies).

B. Wetlands Manual

In 1987, the Corps released a Wetlands Delineation Manual ("Wetlands Manual") which Corps' personnel follow in making wetland determinations. See Defs.' Counter Statement of Facts ¶ 7 (ECF No. 27-9). According to the updated online edition of the Wetlands Manual, use of the 1987 Manual is mandatory in making wetlands determinations. See Wetlands Manual (ECF No. 18-13), at vii. The Wetlands Manual requires present evidence of wetland indicators as to the hydrology, soil and vegetation of the land to make "a positive wetland determination." Id. at v, 10. The Wetlands Manual provides an exception to this rule for atypical situations such as where unauthorized activities, natural events, or manmade wetlands are involved. Id. at 73-74.

A situation is not considered atypical where "areas have been drained under [the Corps'] authorization or that did not require [the Corps'] authorization." Id. at 74.

C. Prior Converted Croplands

In 1993, the Corps indicated in its regulations that "[w]aters of the United States do not include prior converted cropland." 33 C.F.R. § 328.3(a)(8). In a joint final rule by the EPA and the Corps, the agencies stated that:

> By definition, [prior converted] cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, [prior converted] cropland no longer performs the functions or has the values that the area did in its natural condition. [Prior converted] cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the [CWA].

58 Fed. Reg. 45008-01, at 45032. Moreover, the agencies stated that:

> In response to commentors who opposed the use of [prior converted] croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas.

Id. at 45033. The only method provided for prior converted croplands to return to the Corps' jurisdiction under this regulation is for the cropland to be "abandoned," where cropland production ceases and the land reverts to a wetland state. Id.

D. Jacksonville Issue Paper

In January 2009, the Corps' Jacksonville Field Office prepared an Issue Paper announcing for the first time that prior converted cropland that is shifted to non-agricultural use becomes subject to regulation by the Corps. See Issue Paper Regarding "Normal Circumstances" (ECF

No. 18-22) (the "Issue Paper"). This paper was written in response to five pending applications for jurisdictional determinations involving the transformation of prior converted cropland to limestone quarries. The Issue Paper concluded that such a transformation would be considered an "atypical situation" within the meaning of the Wetlands Manual and, thus, subject to regulation. Id. at 1-5. The Issue Paper further found that active management such as continuous pumping to keep out wetland conditions was not a "normal condition" within the meaning of 33 C.F.R. § 328.3(b). This Issue Paper was sent to the Corps' headquarters along with a request for guidance as to whether the Issue Paper reflected the Corps' rules. The Issue Paper was adopted as being an accurate reflection of the Corps' national position by Stockton in an Affirming Memorandum. See Memorandum for South Atlantic Division Commander (Apr. 30, 2009) (ECF No. 18-23) ("Affirming Memorandum").[2] No notice-and-comment period occurred before this memorandum issued. The Corps has implemented and enforced the Stockton Rules nationwide since the Affirming Memorandum issued, and the Corps has issued additional memoranda supporting this policy.

E. New Hope's Proposed Ash Monofill

New Hope runs a renewable energy facility on Okeelanta's property. This property is located on a mill lot (the "Mill Lot") that was previously used to farm sugarcane. In 1993, the Corps indicated in a letter that the property was a prior converted wetland and thus, New Hope did not need a permit to build a renewable energy facility. See Letter from Charles A. Schnepel, Chief, Regulatory Section, the Corps' Miami Field Office to John M. Bossart, KBN Engineering

[2] The Issue Paper and Affirming Memorandum are collectively referred to as the "Stockton Rules."

(May 26, 1993) (ECF No. 18-3). This renewable energy facility was eventually built. New Hope now seeks to construct an ash monofill[3] near the renewable energy facility on the same Mill Lot. The hydrology of the Mill Lot is such that drains, pumps and other devices are used to prevent the area from becoming saturated with water.

On September 1, 2009, after the Corps became aware of the proposed construction, the Corps notified New Hope that "commencement of the proposed work prior to Department of the Army authorization would constitute a violation of Federal laws and subject [New Hope] to possible enforcement action." Letter from Krista Sabin, Project Manager, Jacksonville District Corps of Engineers to Rebecca Kelner, P.E., Jones Edmunds & Assocs. (Sept. 1, 2009) (ECF No. 18-33).

New Hope responded by asking whether the Corps' correspondence with New Hope established "the final decision on how these jurisdictional rules will be applied," and whether individual exceptions might apply. Email from Eric Reusch to Neal McAliley (May 29, 2009) (ECF No. 18-31). The Corps' Jacksonville field office responded that all projects which involved a change from agricultural to non-agricultural use would be assessed based on this approach. Id. In subsequent correspondence, the Corps indicated that "commencement of the proposed work [on the monofill] prior to . . . authorization [from the Corps] would constitute a violation of the federal laws and subject you to possible enforcement action. Receipt of a permit from the Florida Department of Environmental Protection . . . does not obviate the requirement for obtaining [the Corps'] permit prior to commencing the proposed work." Letter from Krista

[3] The ash monofill would essentially serve as a landfill for waste from the renewable energy facility. This would save New Hope the expense of shipping the waste elsewhere.

Sabin, Project Manager, Jacksonville District Corps of Engineers to Rebecca Kelner, P.E., Jones Edmunds & Assocs. (Sept. 1, 2009) (ECF No. 18-33).

On December 23, 2009, Plaintiffs filed the Complaint in the current action under the APA seeking to set aside the Stockton Rules. See Complaint (ECF No. 1). The Complaint alleges that the Stockton Rules improperly (1) create a new rule that wetland exemptions for prior converted croplands are lost upon conversion to non-agricultural use (Count I); (2) create a new rule for circumstances where dry lands are maintained using continuous pumping. Under this new rule, wetland determinations are made based on what the property's characteristics would be if the pumping ceased; (3) create a new interpretation that wetland exemptions for prior converted croplands are lost upon conversion to non-agricultural use (Count III); (4) create a new interpretation for circumstances where dry lands are maintained using continuous pumping (Count IV); (5) are unconstitutionally vague rules; and (6) create rules in excess of statutory authority. Plaintiffs now seek summary judgment in their favor on all claims, entitling them to relief in the form of setting aside and vacating the Stockton Rules. Defendants seek summary judgment on all claims, and dismissing the action.

II. JURISDICTION

A. Finality

Defendants allege that this claim must be dismissed because the challenged rules are not final. Plaintiffs bring this action pursuant to 5 U.S.C. § 704 of the APA, which provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the

> agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704. Plaintiffs claim that this section allows them to obtain review of Defendants' alleged violation of the notice-and-comment requirements found in 5 U.S.C. §§ 552-53.

Thus, the crux of the jurisdictional question is whether the agency action in this case is "final." The ambiguity of this word is well described in a recent journal article:

> Stated broadly, a decision is final when an agency concludes its process. A party will experience an agency decision, such as a guidance, as truly final, especially if the substance of that action reasonably compels that party to make meaningful changes to its conduct. An agency, on the other hand, may have a very different perspective, considering a matter final only when it has exercised any and every regulatory option pertinent to that issuance. These two perspectives do not meld easily.

Gwendolyn McKee, Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine, 60 Admin. L. Rev. 371, 373-74 (2008). To provide guidance in addressing this ambiguity, the Supreme Court has focused on two conditions which must be satisfied for agency action to be considered "final" for the purpose of APA review under section 704: (1) "the action must mark the consummation of the agency's decisionmaking process"; and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted); accord Franklin v. Massachusetts, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."); Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1248 (11th Cir. 2003) (looking at "(1) whether the agency action constitutes the agency's definitive position; (2) whether the action has the status of law or affects the legal rights and obligations of the parties; (3) whether the action will have an immediate impact on the daily

operations of the regulated party; (4) whether pure questions of law are involved; and (5) whether pre-enforcement review will be efficient") (citing FTC v. Standard Oil of Cal., 449 U.S. 232, 239-43 (1980)).

Here, Plaintiffs argue that the Corps' changes in rules regarding prior converted croplands without a notice-and-comment period was improper.[4] The first Bennett prong, consummation of policymaking, is met here because the decision to implement the challenged policy has been completed using definitive language and no further modification of the policy is being considered. See, e.g., City of Dania Beach, Fla. v. F.A.A., 485 F.3d 1181, 1187-88 (D.C. Cir. 2007) (first prong met where nothing in agency letter suggested its "statements and conclusions are tentative, open to further consideration, or conditional on future agency action"). This conclusion is further bolstered by the fact that the challenged policy has now been in place for over a year and has been uniformly implemented throughout the United States.

The second Bennett prong, legal consequences, has also been met. Prior to the shift in policy caused by the Stockton Rules, prior converted croplands were exempt from CWA regulation unless they were abandoned. Following the issuance of the Stockton Rules, prior converted croplands are no longer automatically exempt from CWA – rather they will be subject to regulation where they are converted to non-agricultural use or where they involve continuous pumping. In other words, the Corps' central office has given the field offices their new "marching orders" using mandatory language with respect to prior converted croplands, which

[4] As discussed in Section III, it is well settled that administrative agencies may only issue rules after following a notice-and-comment period 5 U.S.C. §§ 552-53; Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987).

the field offices are now implementing. Appalachian Power Co. v. E.P.A., 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that an agency guidance document had "legal consequences" when the agency "has given the States their 'marching orders'"); see also City of Dania Beach, Fla., 485 F.3d at 1188 (same); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 479 (2001) ("Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final.").[5]

Moreover, the remaining prongs cited by the Eleventh Circuit all suggest finality. See Tenn. Valley Auth., 336 F.3d at 1248. The third prong, immediate impact, is met because Plaintiffs' plans to begin preliminary construction of their monofill are being interrupted. The fourth prong is met because this case almost exclusively involves issues of law. The present challenge does not involve factual determinations, but rather the procedural sufficiency of the policy that the Corps seeks to implement. This determination only requires an analysis of undisputedly authentic Corps' documents. The fifth prong, effective pre-enforcement review, is met because the Court can finally decide the legal issues before it and completely resolve the dispute.

Defendants' counter-arguments are unpersuasive. Many of the cases they cite are inapplicable because they involve pre-enforcement lawsuits that challenged applications of Corps' regulations or legal rules rather than the enactment of Corps' regulations or rules themselves. See, e.g., Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586

[5] The Court acknowledges that some cases, also from the D.C. Circuit, have interpreted the second prong in Bennett more rigidly. See, e.g., Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8 (D.C. Cir. 2005). These cases apply Bennett so rigidly as to entirely preclude review of some types of agency actions. See McKee, Judicial Review, supra, at 400-02.

(9th Cir. 2008) (holding no jurisdiction existed where property owner challenged factual determination by Corps but no regulation was challenged); St. Andrews Park, Inc. v. U.S. Dep't of Army Corps of Eng'rs, 314 F. Supp. 2d 1238 (S.D. Fla. 2004) (challenging the facts that formed the basis of a preliminary jurisdictional determination); Defendants' Brief in Opposition (ECF No. 26) ("Defs.' Opp'n"), at 13-21. These cases focused on the Bennett prong regarding lack of legal consequences, and found that the preliminary factual pronouncements of the field offices did not have legal consequences. Here, by contrast, the agency documents challenged were documents created by the Corps' headquarters and involved a pronouncement of new agency-wide legal rules directing how jurisdiction should be determined. The Stockton Rules cover an entirely new category of property and the Corps' field offices have been directed to follow these new rules, and the legal consequence is that Plaintiffs now have to follow rules that previously did not exist. Therefore, for all the above reasons, the Court finds that the Stockton Rules were a final agency action and the Court has subject matter jurisdiction over the claim.

B. Ripeness

Defendants next challenge the ripeness of Plaintiffs' claims. The Eleventh Circuit recently described the ripeness doctrine as follows:

> The ripeness doctrine is one of the several strands of justiciability doctrine that go to the heart of the Article III case or controversy requirement. While standing concerns the identity of the plaintiff and asks whether he may appropriately bring suit, ripeness concerns the timing of the suit. The function of the ripeness doctrine is to protect federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes. To determine whether a claim is ripe, we assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial review. The fitness prong is typically concerned with questions of finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed. The hardship prong asks about the costs to the complaining party of delaying review until conditions for

deciding the controversy are ideal.

Mulhall v. UNITE HERE Local 355, --- F.3d ----, 2010 WL 3526078, at *8 (11th Cir. Sept. 10, 2010) (ellipses, quotation marks and citations omitted). Here, Defendants argue that Plaintiffs' claim are not yet ripe because (1) additional facts would benefit the Court, and (2) Plaintiffs will suffer no hardship if they cannot seek immediate review. Defs.' Opp'n at 21-25. With respect to the first argument, this Court does not believe that additional site-specific information regarding Plaintiffs' property is necessary to resolve this case. Any administrative review would only involve the new rules' applicability to the facts of Plaintiffs' case, and not involve a review of the policy itself. Plaintiffs nowhere dispute the fact that if the new rules apply, then the subject property would qualify as wetlands. Thus, the issue before the Court is one of law, and factual development would not assist the Court. As to the second prong, a real and heavy burden is being placed on Plaintiffs by Defendants' actions. According to uncontested evidence, creation of the ash monofill would save New Hope $1.4 million a year. The Corps' shift in policy is the only current barrier to commencing construction of the monofill. Thus, a delay in review of this claim would be highly expensive to Plaintiffs. Therefore, considering these two factors, this Court finds Plaintiffs' claims to be ripe for adjudication.

III. MERITS

A. Standard of Review

The applicable standard for reviewing a summary judgment motion is stated in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the

movant is entitled to judgment as a matter of law.

Summary judgment may be entered only where there is no genuine issue of material fact. Twiss v. Kury, 25 F.3d 1551, 1554 (11th Cir. 1994). The moving party has the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. Id.

In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. Id. However, the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

B. Analysis

Plaintiffs allege that Defendants improperly issued new agency rules without using the appropriate notice-and-comment procedures required by the ADA. The ADA provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b). It further requires that

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553(c). The notice-and-comment requirements contained in 5 U.S.C. §§ 553 are not mere formalities. As the D.C. Circuit has observed, "the notice requirement improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review." Sprint Corp. v. F.C.C., 315 F.3d 369, 374 (D.C. Cir. 2003).

The notice-and-comment requirements apply to all agency rules, which are defined broadly as "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. §§ 551(4), 553. The exceptions to the notice-and-comment procedures include agency rules that are "interpretative rules, general statements of policy, or rules of agency organization, procedure." 5 U.S.C. § 553(b)(3)(A).

Here, Defendants do not claim that the Corps engaged in the appropriate notice-and-comment procedures. Rather, they argue that the Stockton Rules are mere policy statements that are not subject to notice-and-comment requirements. Plaintiffs claim that the Stockton Rules limit the discretion of Corps' field offices to such a degree that they constitute legislative rules. In trying to distinguish between legislative rules and policy statements, courts have found that "if a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely

upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures." General Elec. Co. v. E.P.A., 290 F.3d 377, 383-84 (D.C. Cir. 2002). Similarly, courts look to whether the agency establishes a new "binding norm." Nat'l Min. Ass'n v. Sec'y of Labor, 589 F.3d 1368, 1371 (11th Cir. 2009). "The key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case." Id. (citation omitted); see also Cmty. Nutrition Inst., 818 F.2d at 946 (looking at the binding nature of the document and whether it leaves the agency's decisionmakers with discretion). Courts also look to the agency's expressed intention, "whether the statement was published in the Federal Register or the Code of Federal Regulations," and the statement's binding effects on private individuals. Id.

In the present action, there has been a definite shift in the Corps' substantive rules regarding what the Corps considers wetlands. As noted above, before the Stockton Rules, prior converted cropland that was shifted to non-agricultural use was treated as exempt. Following the Stockton Rules, the opposite was true. Similarly, prior to the Stockton Rules, continuous pumping to preserve a converted cropland's state did not impact a property's entitlement to a prior converted cropland designation. Following the Stockton Rules, the opposite was true. Thus, the Stockton Rules broadly extended the Corps' jurisdiction and sharply narrowed the number of exempt prior converted croplands.

Defendants argue that no such shift occurred. Defendants argue that prior converted croplands that changed to non-agriculture use are an atypical situation which leads to loss of exemption. This position is inconsistent with prior agency documents. The Corps' regulations state that "[w]aters of the United States do not include prior converted cropland." 33 C.F.R.

§328.3(a)(8). In the related final rule by the EPA and the Corps, the only means for this status to be lost is abandonment, which requires the land to revert to a present wetlands state. See 58 Fed. Reg. 45008-01, at 45033. In other words, under the prior rule, an exemption would not be lost because a prior converted cropland shifts to nonagricultural use. See, e.g., United States v. Hallmark Const. Co., 30 F. Supp. 2d 1033, 1040 (N.D. Ill. 1998) (holding that even if prior converted cropland had switched to nonagricultural use, no wetland designation existed); RGL 86-9 ("if a former wetland has been converted to another use [other than by unauthorized use] . . . that area will no longer come under the Corps' regulatory jurisdiction"). Moreover, no mention was made of whether the converted state was preserved by pumping or otherwise. Thus, the Corps' new rule creates a second exception, in addition to abandonment, whereby prior converted croplands can lose their exempt status.

Additionally, the new rule also breaks from the plain language of the Wetlands Manual, which is by its terms binding on the field offices. The Wetlands Manual requires that, before an area is designated a wetland, the Corps must find present evidence of wetland indicators as to the hydrology, soil and vegetation. Wetlands Manual at v, 10. The only and exclusive exceptions to this generally applicable definition are atypical situations where unauthorized activities, natural events, or manmade wetlands are involved. Id. at 73-74. Though the Corps attempts to shoehorn the Stockton Rules regarding conversion to non-agricultural usage under the atypical situations exceptions section, none of the existing exceptions include the conversion of prior converted cropland to non-agricultural uses. The only remotely pertinent atypical situation exception is for unauthorized activities, but by its terms, the exception for unauthorized activities does not apply where "areas have been drained under [the Corps'] authorization or that did not require [the

Corps'] authorization." Id. at 74. It is undisputed that Plaintiffs' prior converted croplands did not require the Corps' authorization when they were originally drained, and so this atypical exception does not apply.

Defendants also argue that continuous pumping to preserve a non-wetland state is not a "normal circumstance" within the meaning of 33 C.F.R. § 328.3(b); rather, the normal state must be judged by what conditions would return if pumping ceased. This position is impossible to reconcile with prior agency positions, including the repeatedly reaffirmed position that many "wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such natural circumstances are not what is meant by 'normal circumstances'." RGL 86-9 (Aug. 27, 1986); RGL 05-06 (Dec. 7, 2005) (stating that RGL 86-9 still applies).[6] Similarly, Defendants' position is contradicted by the Wetlands Manual's requirement that the Corps only looks at present evidence, or evidence from the recent past, to make wetlands determinations. No provision exists in the manual to determine hypothetical conditions that may return upon abandonment when examining "normal circumstances."

Defendants also argue that Stockton does not even have the power to implement new final rules, and thus the Stockton Rules could not create a binding new norm. The record makes

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[6] Defendants cite to RGL 90-07 (ECF No. 26-6), which expressly re-affirms the "normal circumstances" definition contained in RGL 86-9, but notes that unauthorized active pumping used to destroy recently existing wetlands characteristics cannot be used to eliminate wetlands jurisdiction. Such a scenario would be an atypical situation under the Wetlands Manual because it involves an unauthorized use of pumping. The pumping covered by the Stockton Rules, by contrast, includes authorized pumping such as pumping on prior converted croplands that have long been exempt from regulation. Thus, RGL 90-07 does not support Defendants' position.

clear that, whether or not Stockton has the authority to implement new rules, he has done so.[7] Defendants have admitted that the Stockton Rules are the Corps' current policy. If anything, Defendants' argument suggests that the new rules should be set aside because rules that are normatively binding are emerging from unauthorized individuals. Thus, for all the above reasons, the Stockton Rules constitute new legislative and substantive rules, and create a binding norm. Therefore, the Stockton Rules and their progeny were procedurally improper because no notice-and-comment procedures were used. Accordingly, the Stockton Rules must be set aside.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Plaintiffs' Motion for Preliminary Injunction and for Summary Judgment (ECF No. 18) is GRANTED IN PART. The Court hereby SETS ASIDE the Corps' Issue Paper Regarding "Normal Circumstances" (ECF No. 18-22) and Memorandum for South Atlantic Division Commander (Apr. 30, 2009) (ECF No. 18-23) in their entirety. The Corps may not, without engaging in rulemaking using appropriate notice-and-comment procedures, determine the existence of wetlands in a manner inconsistent with this Order.[9] It is further,

ORDERED AND ADJUDGED that Defendants' Cross Motion for Summary Judgment

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[7] Similarly, the Court does not afford much weight to the fact that the Stockton Rules were not published in the Federal Register or the Code of Federal Regulations, as the very issue in front of the Court is whether the Corps circumvented use of rulemaking formalities.

[8] Because this analysis of Claims One and Two are sufficient to decide the issue before the Court, the Court does not reach the remaining claims.

[9] Plaintiffs' request for injunction is mooted by the granting of final relief.

(ECF No. 27) is DENIED. Plaintiffs' Motion for Hearing (ECF No. 33) is DENIED AS MOOT. All other pending motions not otherwise ruled upon are DENIED AS MOOT. The Clerk of the Court is instructed to CLOSE this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of September, 2010.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 10-22777-CIV-MOORE/SIMONTON

NEW HOPE POWER COMPANY and
OKEELANTA CORPORATION,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS OF
ENGINEERS and STEVEN L. STOCKTON,
in his official capacity as Director of Civil
Works, United States Army Corps of
Engineers,

Defendants.
_____/

ORDER DENYING DEFENDANTS' MOTION PURSUANT TO RULE 59(e) TO ALTER OR AMEND JUDGMENT; GRANTING THIRD PARTY MOTIONS TO INTERVENE

THIS CAUSE came before the Court upon Defendants' Motion Pursuant to Rule 59(e) to Alter or Amend Judgment (ECF No. 49), Intervenor Plaintiffs' Motion to Intervene (ECF No. 47), and Intervenor Defendants' Renewed Motion to Intervene (ECF No. 50). These motions are now fully briefed.

UPON CONSIDERATION of the Motions, the Responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. MOTION TO AMEND JUDGMENT

A. Background

On September 29, 2010, this Court entered an Order granting in part Plaintiffs' Motion for Preliminary Injunction and for Summary Judgment. See New Hope Power Co. v. U.S. Army

Corps of Engineers, 2010 WL 3834991 (S.D. Fla. Sept. 29, 2010).[1] In granting relief, the Court set aside the Stockton Rules and stated that "the Corps may not, without engaging in rulemaking using appropriate notice-and-comment procedures, determine the existence of wetlands in a manner inconsistent with this Order." New Hope Power Co., 2010 WL 3834991, at *9; see also Final Judgment (ECF No. 46) (same). Defendants now move to alter or amend this Order and Judgment pursuant to Fed. R. Civ. P. 59(e).

B. Standard of Review

"The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact. A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (citations omitted).

C. Analysis

Defendants' motion argues that this Court made three "manifest errors" of law: (1) that the four-factor test for granting an injunction was not met; (2) that the injunction granted was overbroad; and (3) that the injunction unduly restricts the Corps' lawful activities. Each of these arguments is addressed in turn.

1. Four-Factor Test

The Supreme Court recently held that:

> a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of

[1] The facts surrounding this case are discussed at length in that Order, and familiarity is assumed.

> hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2757 (2010) (citation omitted). District Courts are not required to make explicit findings of fact as to the existence of these factors. Nat'l Min. Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1408-09 (D.C. Cir. 1998). Here, each of the factors are met. Plaintiffs' injury was shown in that they were unable to construct an ash monofill that would save $1.4 million a year. New Hope Power Co., 2010 WL 3834991, at *6. No adequate monetary remedy is available.[2] While Plaintiffs face economic injury, the only hardship to Defendants is that they must engage in a notice-and-comment period which they are legally required to engage in before enacting new rules. Further, the public interest will be served by the benefits of participation in the notice-and-review process. Thus, this Court committed no manifest error in granting injunctive relief.

2. Broadness of Injunction

Defendants argue that this Court's injunction is overbroad in that it applies to all actions by the Corps, rather than simply to the restrictions placed on Plaintiffs or to individuals in this District. These arguments lack any basis.

> The Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he

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[2] Defendants argue that the Court could have imposed milder relief by simply setting aside the Stockton Rules without restricting future action. However, Plaintiffs would not be adequately protected if the Corps could simply reenact the Stockton Rules. Thus, the relief, as crafted, was the least restrictive manner to insure that the notice-and-comment requirements were respected.

> is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court. On the other hand, if a generally lawful policy is applied in an illegal manner on a particular occasion, one who is injured is not thereby entitled to challenge other applications of the rule.

Nat'l Min. Ass'n, 145 F.3d at 1409 (citation omitted); see also 5 U.S.C. § 706(2)(A) ("The reviewing Court shall . . . hold unlawful and set aside agency action . . . not in accordance with the law."). Thus, "Government-wide injunctive relief for plaintiffs and all individuals similarly situated can be entirely appropriate and it is 'well-supported by precedent, as courts frequently enjoin enforcement of regulations ultimately held to be invalid.'" Doe v. Rumsfeld, 341 F. Supp. 2d 1, 17-18 (D. D.C. 2004) (collecting cases). Here, a rule of broad applicability was set aside because the new agency rules were enacted throughout the Corps without following the appropriate notice-and-comment procedures. Thus, broad relief was necessary.

Defendants rely on Va. Society for Human Life, Inc. v. Fed. Election Com'n, 263 F.3d 379 (4th Cir. 2001) in making their argument that relief should be limited to the harmed individual. This case runs counter to language in Lujan v. Nat'l Wildlife Fed, 497 U.S. 871 (1990), stating that where an agency action is validly challenged, the entire agency's program is impacted. Id. at 890 n.2; see also Nat'l Min. Ass'n, 145 F.3d at 1409; Doe, 341 F. Supp. 2d at 17-18. Additionally, as the D.C. cases note, broad relief avoids the danger of a flood of duplicative litigation. Thus, this Court committed no manifest error of law with respect to the broadness of the injunction.

3. Prevention of Lawful Agency Action

Defendants claim that this Court is restricting the Corps' future lawful actions with respect to wetlands determinations and that it has been enjoined from interpreting its own

regulations. Defendants overstate the degree to which they have been constrained. This Court did not rule that the Corps had no discretion to enact the Stockton Rules, that the Stockton Rules were unconstitutional, violated the scope of the Corps' statutory authority, or even that they were bad policy. The Court took no stance on any of these issues. Rather, the Court merely held that the Corps needed to follow the appropriate notice-and-comment procedures before re-enacting the Stockton Rules.

Further, Defendants fail to point to any "lawful action" that is being prevented. In Monsanto, 130 S. Ct. 2743, the case relied on by Defendants, the Animal and Plant Health Inspection Service was precluded from even partially deregulating use of a genetically engineered alfalfa variety until a complete environmental impact statement ("EIS") was performed regarding the variety. This was done even though under the National Environmental Policy Act of 1969, a partial deregulation decision may have been a valid alternative to an EIS. Id. at 2757. Here, Defendants have pointed to no parallel exception to the notice-and-comment requirements that would allow Defendants to re-enact part of the key changes created by the Stockton Rules: the extension of the Corps' jurisdiction to situations where prior converted croplands are converted to non-agricultural use, or where dry lands are maintained using continuous pumping. Without a parallel exception, Defendants are essentially arguing that they should have the discretion to further violate the notice-and-comment requirements. They have no such discretion. See 5 U.S.C. § 553(b). Thus, this Court committed no manifest error of law with respect to the degree to which the injunctive relief limits the Corps' actions.

II. MOTIONS TO INTERVENE

The Federal Rules of Civil Procedure provide that "[o]n timely motion, the court may

permit anyone to intervene who: . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P 24(b). Here, both Intervenor Plaintiffs and Defendants[3] have claims that share a common question of law or fact. Intervenor Plaintiffs had another case pending that sought to set aside the Stockton Rules, which case has since been stayed because the Stockton Rules have been set aside. Whether this case is affirmed or reversed will significantly impact the outcome of that case. Intervenor Defendants are organizations with significant interests[4] in the Everglades, an area that will be impacted by the outcome of this case. Defendants' suggestion that the Intervenor Parties' motions are untimely is without merit. This case was decided promptly and the fact that the motions were made post-judgment does not suggest undue delay. Moreover, Intervenor Plaintiffs moved after their own case was stayed and Intervenor Defendants initially moved before the Summary Judgment Order in this case was entered. Moreover, no prejudice to the main Parties will result from the addition of the Intervenor Parties. Thus, the Motions to Intervene are granted.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendants' Motion Pursuant to Rule 59(e) to Alter

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[3] The Intervenor Plaintiffs in this action are the American Farm Bureau Federation, United States Sugar Corporation, and National Association of Home Builders. The Intervenor Defendants are the National Audubon Society and Florida Audubon Society.

[4] These interests include conducting millions of dollars of research in the Everglades, providing organized field trips for the public in the Everglades, and frequently visiting it for science, education and recreational purposes.

or Amend Judgment (ECF No. 49) is DENIED. Intervenor Plaintiffs' Motion to Intervene (ECF No. 47), and Intervenor Defendants' Renewed Motion to Intervene (ECF No. 50) are GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of February, 2011.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record